Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1976

No. 76-1804

A.E. HOTCHNER,

Petitioner,

-against-

DOUBLEDAY & COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MERVIN ROSENMAN
Attorney for Petitioner
41 East 57th Street
New York, New York 10022
(212) 371-3633

SIMON J. HAUSER
Of Counsel

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented For Review 2

Constitutional Provision Involved 3

Statement of the Case 3

Reasons For Granting the Writ:

I. The Court of Appeals has decided an important question of federal law in a way conflicting with the applicable decisions of this Court and another Circuit Court of Appeals. 5

II. The verdict was more than adequately supported by clear and convincing proof that Doubleday published with reckless disregard of the truth. The Circuit Court not only overlooked or misapprehended that evidence but also, disregarding established principles of law, in effect tried the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of publication, and substituted its own view of the facts for that of the jury and trial court. .. 9

A. The verdict was more than adequately supported by clear and convincing proof that Doubleday published with reckless disregard of the truth. 10

Contents

Page

B. The Second Circuit not only overlooked or misapprehended that evidence but also, disregarding established principles of law, in effect tried the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of the publication, and substituted its own view of the facts for that of the jury and trial court. 17

III. The reversal by the Second Circuit was clearly in contravention of the Seventh Amendment. 27

Conclusion 28

TABLE OF CITATIONS

Cases Cited:

Arkwright Mutual Insurance Co. v. Philadelphia Electric Co., 427 F.2d 1273 (3rd Cir. 1970) 18, 27

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962) 9, 27, 28

Bennett v. Buchan, 76 N.Y. 386 (1879) 15

Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966) 8

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3489 (1977) 10, 13, 20, 25

Contents

Page

Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976), rehear. and rehear. en banc denied (3/5/76) 10, 11, 13, 15, 16, 20, 23

Cheatham v. Wehle, 5 N.Y.2d 598, 186 N.Y.S.2d 606, 159 N.E.2d 166 (1959) 26

Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 (1961) 6, 9

Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920) 15, 26

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 22, 24

Diapulse Corp. of America v. Birtcher Corp., 362 F.2d 736 (2d Cir. 1966), cert. dism., 385 U.S. 801 (1966) 7

Farr v. Newman, 18 A.D.2d 54, 238 N.Y.S.2d 204 (4th Dept. 1963), aff'd., 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964) 15

Garcia v. Murphy Pacific Salvaging Co., 476 F.2d 303 (5th Cir. 1973) 9

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 24

Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970), rehear. denied, 397 U.S. 978 (1970) 10, 15, 16, 19, 22, 24

Gonzales v. Missouri Pacific R.R. Co., 511 F.2d 629 (5th Cir. 1975) 27

Contents

Page

Guam Federation of Teachers Local 1581 AFL v. Ysrael, 492 F.2d 438 (9th Cir. 1974), cert. denied, 419 U.S. 872 (1974) 2, 5, 6, 20

Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), cert. denied, 391 U.S. 913 (1968) 17

Herbert v. Lando, (S.D.N.Y. 74 Civ. 434, 1/4/77 ___ F. Supp. ___) 26

Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251 (1975), cert. denied, 426 U.S. 907 (1976) 20

Lavender v. Kurn, 327 U.S. 645 (1946) 8, 18

Moore v. Guthrie Hospital, Inc., 403 F.2d 366 (4th Cir. 1968) 27

New York Times v. Sullivan, 376 U.S. 254 (1964) 2, 3, 5, 6, 7, 8, 9, 10, 17, 24

Powers v. Continental Casualty Co., 301 F.2d 386 (8th Cir. 1962) 18, 27

Sprouse v. Clay Communications Inc., 211 S.E.2d 674 (1975), cert. denied, 423 U.S. 882 (1975), rehear. denied, ibid., 991 (1975) 17

St. Amant v. Thompson, 390 U.S. 727 (1968) ...9, 10, 15, 16, 20

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944), rehear. denied, 322 U.S. 767 (1944) 18

Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29 (1944) 26

Contents

Page

Triggs v. Sun Printing and Publishing Association, 179 N.Y. 144, 71 N.E. 739 (1904) 24, 26

United States v. Massachusetts Bonding & Insurance Co., 303 F.2d 823 (2d Cir. 1962), cert. denied, sub nom., One Gustavsson Lumber Co., Inc. v. Browne & Bryan Lumber Co., Inc., 371 U.S. 942 (1962), rehear. denied, 372 U.S. 932 (1973) 18

Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969), rehear. denied, 394 U.S. 930 (1969) 11

Statute Cited:

28 U.S.C. Sec. 1254(1) 2

United States Constitution Cited:

First Amendment 5, 6, 8, 24

Seventh Amendment 3, 27

APPENDIX

Opinion of the Court of Appeals 1a

Memorandum Opinion of the District Court 10a

In The

Supreme Court of the United States

October Term 1976

No. 76-

A.E. HOTCHNER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner A.E. Hotchner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit herein, reversing a judgment of the District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals (Lumbard, Cir. J.) is reported at 551 F.2d 910, and appears in the Appendix to this petition at 1a.[1] The memorandum opinion of the District Court

1. Issuance of mandate to and including June 21, 1977, pending this application for certiorari, was stayed by order of the Court of Appeals dated May 19, 1977.

(Brieant, D.J.) is not reported. It appears in the appendix at 10a. An earlier opinion of the District Court, denying the motion of respondent Doubleday for summary judgment, was reported at 404 F. Supp. 1041.

JURISDICTION

Judgment of the Court of Appeals was entered on March 23, 1977. A timely petition for rehearing with a suggestion for rehearing *en banc* filed by petitioner was denied on May 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. (a) Have *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and subsequent cases, changed not only the *standard* under which the evidence in a libel or invasion of privacy case must be examined, but also the *manner* in which the evidence is to be examined in the determination of whether or not a plaintiff has adduced the proof entitling him to go to the jury? In other words, do those cases nullify the general principles that, *inter alia,* evidence must be viewed in the light most favorable to the appellee and that the jury verdict must be upheld if supported by adequate evidence?

(b) Is not the decision of the Second Circuit Court of Appeals in direct conflict with the decision of the Ninth Circuit [*Guam Federation of Teachers Local 1581 AFL v. Ysrael,* 492 F.2d 438 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974)] on that point?

2. Did the Court of Appeals not only overlook or misapprehend clear and convincing proof that respondent Doubleday published with reckless disregard of the truth, but also, in violation of established principles of law, in effect try the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury as well as on testimony as to matters not known to Doubleday at the time of

publication, and substitute the appellate court's own view of the facts for that of the jury and trial court?

3. Did not the decision of the Court of Appeals deprive the petitioner of his right to a jury trial on the factual issues under the Seventh Amendment?

4. (a) Is not the decision of the Second Circuit an unauthorized and unwarranted extension of the *New York Times* rule? As a matter of law may a publisher, on notice of his author's bitter hatred of the plaintiff and the libelous nature of the material involving an attack on the personal characteristics of the plaintiff, nevertheless publish without investigation?

(b) Did not the Second Circuit err in disallowing such evidence to be considered by the jury on the issue of "reckless disregard"?

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII — Civil Trials:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Petitioner, intimate friend of Ernest Hemingway and author of, *inter alia,* the highly successful "Papa Hemingway", a memoir of their friendship, brought an action for libel and violation of his rights of privacy under the New York Civil Rights Law Sec. 51. The offensive matter (described by the Court of Appeals at Appendix, 4a) was contained in the "Hemingway in Spain" ("Book") published by respondent in 1974, which was an English translation of the work originally published in Spanish in 1967,

written by Jose Castillo-Puche.[2] The trial court held that "for purposes of this litigation, plaintiff Hotchner has achieved the status of a public figure." 404 F. Supp. 1041, 1047.

After a five-day trial, the jury returned a verdict for petitioner on both claims pleaded in the total amount of $125,002. A motion by Doubleday for judgment n.o.v. or in the alternative, for a new trial on general grounds and also excessiveness, was denied by the trial court. The Court of Appeals reversed solely on the ground that, although:

> "In this case, the jury could reasonably have found that, contrary to the impression of intimacy conveyed by his book, Castillo-Puche's actual contact with, and first-hand knowledge about Hotchner was virtually nil . . . [and] . . . Castillo-Puche's denunciations of Hotchner were sufficient to put Doubleday on notice of Castillo-Puche's animosity toward Hotchner (Appendix, 7a), . . . there was no evidence on which the jury might reasonably have found that the defendant Doubleday published the alleged libels with knowledge or reckless disregard for the truth" (*Ibid.*, 9a).

There was no criticism whatsoever of the action of the trial court and no finding or intimation of error with respect to the conduct of the trial, the charge, the admission or barring of evidentiary matter, or the trial court's rulings on the several pre-trial motions. Also, the Court of Appeals did not question that the offensive matter and conduct for which the jury awarded damages were otherwise actionable.

Petitioner maintains (a) that the verdict was more than adequately supported by clear and convincing proof that

2. On application of the Spanish Consul, the suit against the author, a Spanish citizen and resident, was dismissed without prejudice for want of personal jurisdiction over that defendant (Appendix, 16a).

Doubleday published with reckless disregard of the truth;[3] (b) the Court of Appeals not only overlooked or misapprehended that evidence, but also, in disregard of established principles of law, in effect tried the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of the publication, and substituted its own view of the facts for that of the jury and of the trial court which had denied Doubleday's motion for judgment n.o.v. or for a new trial.

It is respectfully submitted that such decision of the Second Circuit (1) extends the rule of *New York Times v. Sullivan* far beyond the subsequent decisions of this Court; (2) directly conflicts with the holding of the Ninth Circuit in *Guam Federation of Teachers Local 1581 AFL v. Ysrael, supra;* (3) departs from the basic law governing the functions of an appellate court; and (4) has deprived plaintiff of his rights under the Seventh Amendment.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY CONFLICTING WITH THE APPLICABLE DECISIONS OF THIS COURT AND ANOTHER CIRCUIT COURT OF APPEALS.

This appears to be the first First Amendment case where the appellate court overturned a jury's finding of "reckless disregard" in a special verdict and the trial court's refusal to set aside that verdict.

---

3. To avoid repetition, we will summarize that evidence in our discussion under the Reasons for Granting the Writ, *infra,* II, pp. 9-17.

The Second Circuit proceeded on the basis that:

> "To ensure that proper weight has been given to the protection of First Amendment rights, it is important that the Court make 'an independent examination of the whole record' in scrutinizing the jury finding of scienter in a libel case." (Appendix, 6a).

We submit that any duty to re-examine the evidentiary basis of the lower court decision does not nullify the general principles that, as set forth in *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 696 (1961), on appeal the "Court of Appeals was, of course, bound to view the evidence in the light most favorable" to the appellee "and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn," and that insofar as factual issues are concerned, the verdict for plaintiff is to receive "the advantage of every fair and reasonable intendment that the evidence can justify."

In short, the additional burden of proof, imposed upon a First Amendment plaintiff by *New York Times v. Sullivan* and subsequent cases, has not changed the way the findings below are to be considered.

Reviewing those cases, another Court of Appeals aptly said in *Guam Federation of Teachers Local 1581 AFT v. Ysrael*, 492 F.2d 438 (9th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974), at 441:

> "We think that in a libel case, as in other cases, the party against whom . . . a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can

> properly be drawn in his favor by the trier of the facts. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.
>
> "The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined is the same as in all other cases in which it is claimed that a case should not go to the jury." (emphasis by the court).

Nevertheless, the Court of Appeals for the Second Circuit in the instant case substituted its own view of the evidence in place of the jury's findings (in a special verdict) of "reckless disregard" as fully and properly defined by the trial court in its charge,[4] and, indeed, in overturning the jury's findings, took into consideration testimony as to matter not known to the publisher at the time of publishing the defamatory matter.

---

4. This, although it had said in *Diapulse Corp. of America v. Birtcher Corp.*, 362 F.2d 736, 743 (2d Cir. 1966), *cert. dism.*, 385 U.S. 801 (1966), in upholding the verdict in that post-*New York Times* libel case:

> "'Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury.' [citations]. When reviewing the refusal of a judge to grant a directed verdict we must view the evidence and all inferences which reasonably flow from it most favorably to the party against whom the motion was directed. [citations]."

Petitioner does not and did not ever argue that it was not required to meet the *New York Times* standard, *i.e.*, demonstrate by "clear and convincing proof" that defendant Doubleday published with "reckless disregard as to the truth or falsity." We do maintain that an appellate court, even in First Amendment cases, is not authorized to substitute its own view of the evidence in place of the jury's findings of "reckless disregard" as properly defined by the trial court in its charge. The words of the Court in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946), as well as these in the *Continental Ore* decision above quoted, are as applicable to the consideration of a First Amendment case as any other jury verdict:

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (emphasis supplied).[5]

---

5. See also *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 536 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966), reinstating the jury verdict based on the issue of wilful misconduct (in a Warsaw Convention case).

The Court of Appeals cannot redetermine facts found by the jury. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 359 (1962); *Garcia v. Murphy Pacific Marine Salvaging Co.*, 476 F.2d 303, 306 (5th Cir. 1973), and many others. But this, we submit, is what the Second Circuit did in the case at bar. We respectfully suggest that, after a review of the facts as set forth in Reason II, *infra*, the Court could well repeat the words of Mr. Justice White in *Continental Ore Co. v. Union Carbide & Carbon Corp., supra*, 370 U.S. at 696-7:

> "From our examination of the rather extensive record we have concluded that the Court of Appeals departed from this rule and erred in holding that there was insufficient evidence to support [the] finding. . . ."

II.

THE VERDICT WAS MORE THAN ADEQUATELY SUPPORTED BY CLEAR AND CONVINCING PROOF THAT DOUBLEDAY PUBLISHED WITH RECKLESS DISREGARD OF THE TRUTH. THE CIRCUIT COURT NOT ONLY OVERLOOKED OR MISAPPREHENDED THAT EVIDENCE BUT ALSO, DISREGARDING ESTABLISHED PRINCIPLES OF LAW, IN EFFECT TRIED THE CASE *DE NOVO*, RELYING ON TESTIMONY OF DEFENDANT'S WITNESSES THAT OBVIOUSLY HAD BEEN REJECTED BY THE JURY AND ALSO ON MATTER NOT KNOWN TO DOUBLEDAY AT THE TIME OF PUBLICATION, AND SUBSTITUTED ITS OWN VIEW OF THE FACTS FOR THAT OF THE JURY AND TRIAL COURT.

The determination as to whether Doubleday published the book with the "actual malice", *i.e.*, reckless disregard, required by *New York Times v. Sullivan*, was for the jury as the finder of fact. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Even in

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3489 (1977), a non-jury case, the Second Circuit stated at p. 896:

> "The findings were that Littell's statement that Buckley engaged in libelous journalism was made with knowledge of its falsity or in reckless disregard of its truth or falsity, and *this is a finding based in part upon credibility and demeanor which we cannot go behind."* (emphasis supplied).

The record substantiates that plaintiff unquestionably *did* adduce "clear and convincing proof" so as to make a *prima facie* case under the *New York Times* rule. Accordingly, the Circuit Court was not entitled to disregard the jury verdict and in effect try the case *de novo.*

A. The verdict was more than adequately supported by clear and convincing proof that Doubleday published with reckless disregard of the truth.

While "'reckless disregard', it is true, cannot be fully encompassed in one infallible definition" (*St. Amant v. Thompson, supra,* 390 U.S. at 730), if defendant entertained serious doubts as to the truth of his publication, "publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice." *Ibid.,* 731.

Recklessness on the part of Doubleday may be found if there were "obvious reasons" to doubt the veracity of Puche or the accuracy of his reports. *Ibid.,* 732; *Goldwater v. Ginzburg,* 414 F.2d 324, 337 (2d Cir. 1969); *cert. denied,* 396 U.S. 1049 (1970), *rehearing denied,* 397 U.S. 978 (1970); *Carson v. Allied News Co.,* 529 F.2d 206, 209 (7th Cir. 1976), *rehearing and rehearing en banc denied* (3/5/76).

If, for example, knowing that there was a high probability that Puche's statements about Hotchner might be false, Doubleday took a calculated risk and published the matter anyway, that would be an example of "reckless disregard." *Varnish v. Best Medium Publishing Co.*, 405 F.2d 608, 612 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969), *rehearing denied*, 394 U.S. 930 (1969); *Carson v. Allied News Co., supra*, 529 F.2d at 213.

As Judge Brieant said regarding that proof of liability in his memorandum denying Doubleday's motion for judgment n.o.v. or a new trial:

> "[W]e think the proof more than adequate to support the detailed and carefully considered special findings of our attentive and diligent jury. Our jury could and did find, as to those of Hotchner's claims which it found actionable, that clear and convincing evidence showed Doubleday published with reckless disregard for their truth or falsity. Indeed, for the most part this clear and convincing evidence is documentary and comes from Doubleday's files, or was in possession of persons whose knowledge the jury could reasonably impute to Doubleday." Appendix, p. 11a.

That evidence included the following:

A year before publication, Doubleday's employees had serious doubts about the references to Hotchner in the Book. On July 13, 1973, editor Medina sent a memorandum (Exh. 7, 212a)[6] to the Manager of Doubleday's Contracts Department,

---

6. "a" indicates page of Appendix on Appeal to the Circuit Court, "t" refers to pages of the Trial Record.

enclosing eight pages (Exhs. 5A-G, 203-210a) of Helen Lane's translation relating to Hotchner, asking him for his opinion as to whether what she termed the "bitchy" and "side-swiping" matter should be left in. In addition to many of the words the jury found libelous, those eight pages contained phrases from the Spanish Work which showed Puche's bitter hatred of Hotchner. Exh. 5D (206a) purports Hemingway saying about Hotchner "he's dirty and a terrible ass-licker. . . . I wouldn't sleep in the same room with him,"[7] and Exh. 5E (208a) purports Hemingway saying of Hotchner "he's never done me dirt, but he's the sort of person you have to keep your eye on every minute."

The reply memorandum (Exh. 9), of young William Austin, the Assistant Contracts Manager of Doubleday, who was not a lawyer, urged that these references to Hotchner be "toned down or eliminated" by Medina, and concluded:

> "When looked at together *these statements certainly ridicule Hotchner and impugn his reputation and character.* As he seems to be an author who has worked in movies and TV, *this could be a serious matter.*
>
> *To make matters worse I doubt whether any of these statements can be substantiated in any way.*
>
> From reading the pages you sent, this treatment *borders on 'malice', which together with 'reckless*

---

7. There are two obvious inferences from this quotation, both libellous. Either Hotchner would steal his valuables or would make homosexual advances. The latter inference is intended by Puche for on p. 82 of the Book, he quotes Hemingway: "I don't trust anyone . . . I did once and the guy tried to hop in bed with me," as part of a conversation explicitly dealing with Hotchner.

> *disregard for the truth,' is a prime element in any libel action . . . .*" (emphasis added) (214a).[8]

This alone was sufficient to impose a duty of inquiry upon Doubleday, if not *per se* to substantiate the finding of reckless disregard. *Cf.* the Court's comment in *Buckley v. Littell, supra,* 539 F.2d at 896:

> "Furthermore, Littell's publisher was very concerned about the paragraph in which the Pegler reference occurs, although not specifically about the sentence here found to be libelous; this concern should have been a red flag to Littell."

So, in *Carson v. Allied News Co., supra,* 529 F.2d at 211, the Court noted:

> "They were also aware as publishers that the substance of the defamatory statements they were publishing made 'substantial danger to reputation apparent' [citations]."

Fully aware of Puche's hatred toward Hotchner, his reckless disregard for the truth, and the problems involved in this publication, Medina wrote to Puche on August 6, 1973 (Exh. 11) regarding:

> ". . . the possibility of libel to Hotchner in the book. You are certainly entitled to your opinion

---

8. More than one year prior to the Austin memorandum, Medina had been put on notice by a letter from Lane (Exh. 17), as to the general unreliability of Puche's Book:

> "Moreover I discovered that a large number of Castillo-Puche's comments about the episodes in Hemingway's novels contain *gross errors of fact* . . . Groan! . . . Groan!" (227a). (emphasis added).

> of Hotchner, and you may very well be right — it seems to our lawyers[9] that it would be a good idea if we would tone down some of your remarks about him, on the off chance that he could possibly bring suit against you. The fact that he is an American *author with quite a reputation,*[10] and also I seem to recall a professor, it's possible that he would think *some of your remarks border on 'malice' (in the legal sense) and that it would be professionally damaging to him, which in a legal sense could come under the legal grounds 'damaging to his reputation and character'. . . .*" (emphasis added). (217a).

In addition to the foregoing documentary evidence and admissions, plaintiff introduced further evidence from which the jury could infer Doubleday's knowledge of Puche's unreasoning hatred of Hotchner and the suspicion of falsity which must necessarily be aroused.

The testimony of Professor Purczinski (259-268a) and his translations in a comparative table with the Lane translation (where available) and the Book (Exh. 30, 230a *et seq.*) shows the unbridled attacks on Hotchner personally in the original Spanish book. Exh. 30 reveals Puche saying of Hotchner: "his role of shit-licker of the old colossus was so ostentatious that it almost made you want to vomit" (230a), "that his [Hotchner's] gaze which was a cross between a voluptuous cornered animal, a lynx with a 'quiqui'" (Spanish slang for holdup man) (233a), "what he [Hotchner] looked most like was the leader of one of

9. The statement attributed to "our lawyers" was a Medina fabrication, for no lawyer saw the Book prior to publication (253t). The fact that, despite the serious doubts of Medina and Austin, legal counsel was never consulted is also evidence of recklessness under the circumstances.

10. Recognition of Hotchner's prominence and nevertheless not checking into the facts is further evidence of recklessness.

the New York or Chicago gangs" (233a), and "Hotchner, with mocking face of the congenial gutter-rat" (234a).[11]

Obviously, in translating the Puche book from Spanish to English, Doubleday's agent Lane acquired knowledge of that irrational vicious hatred, and, as said in Judge Brieant's Memorandum, that "knowledge the jury could reasonably impute to Doubleday." (Appendix, p. 11a).

The bald and inescapable fact is that Doubleday published with "serious doubts" *after* acquiring knowledge of its author's bitter hatred of Hotchner, *i.e.*, "with obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson, supra,* 390 U.S. at 732; *Carson v. Allied News Co., supra,* 529 F.2d at 213-4, and *without making the slightest effort to verify the facts despite its knowledge of that virulent animosity.*[12]

While it may be that, as the Circuit Court said herein at Appendix, p. 6a, "mere negligence is not actionable," it is certainly true that evidence of negligence may be considered for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. *Goldwater v. Ginzburg, supra,* 414 F.2d at 342. That Court continued at p. 343:

---

11. *Cf.* those scurrilous descriptions with Hemingway's own reference to Hotchner's "rugged honest face" in the "*Life* Articles" (Exh. 29-C); see *infra,* p. 21.

12. The rule that a principal is bound by knowledge of his agent as to all matters within the scope of agency, applies as well to material facts which the agent would have discovered had [s]he inquired, *i.e.*, what [s]he *should* have known. See *Bennett v. Buchan,* 76 N.Y. 386, 390-391 (1879); *Corrigan v. Bobbs-Merrill Co.,* 228 N.Y. 58, 71-72, 126 N.E. 260, 265 (1920); *Farr v. Newman,* 18 A.D. 2d 54, 58-59, 238 N.Y.S.2d 204, 208-209 (4th Dept. 1963), *aff'd.,* 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964).

> "As already stated, supra, *Times* does not hold that evidence of recklessness is inadmissible. . . . Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court." (citing *St. Amant v. Thompson, supra,* at 732-733).

Furthermore, in reviewing the evidence adduced by plaintiff, while the Circuit Court mentions the elimination or toning down by Doubleday's editor of "very uncomplimentary references to Hotchner" in the translation from the Spanish edition (Appendix, p. 3a), it ignores Medina's letter to Puche dated August 6, 1973, in which she recognized Puche's intention "to get at Hotchner, one way or the other, very strongly," and sought to console him by assurances that even after the bowdlerization, "*I* [*i.e.,* Doubleday's editor] certainly won't make Hotchner look marvelous."

Certainly Doubleday had reason to "seriously doubt" the scandalous accusations, especially where the libel warning from its employee Austin recognized Hotchner as a man of stature and Medina knew him as an intimate and biographer of Hemingway whom, as she said in a letter to Hotchner before publication, had written "such a wonderful book about Hemingway" (Exh. 22).

Under the circumstances Puche's attacks were so "inherently improbable" that to rely solely on his words did not release Doubleday from responsibility. *Goldwater v. Ginzburg, supra,* 414 F.2d at 337; *Carson v. Allied News Co., supra,* 529 F.2d at 213.

Unquestionably, the foregoing constitutes a prima facie case under the *New York Times v. Sullivan* rule.

As stated in *Sprouse v. Clay Communications Inc.*, 211 S.E. 2d 674, 689-90 (1975), *cert. denied,* 423 U.S. 882 (1975), *rehearing denied, ibid.* 991 (1975):

> "Each case must be considered by an appellate court on its facts with a strong sympathy toward protection of the robust political discussion contemplated by the First Amendment. At some point, however, cumulative evidence will show that the line of protection is breached and a jury must be permitted to find malice. . . ."

B. The Second Circuit not only overlooked or misapprehended that evidence but also, disregarding established principles of law, in effect tried the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of the publication, and substituted its own view of the facts for that of the jury and trial court.

Going beyond the examination of the prima facie evidence adduced by plaintiff-appellee, the Circuit Court relied on the testimony of appellant Doubleday's witnesses to overturn the reasoned special verdict of the jury and the decision of the trial court which had denied Doubleday's motion to set it aside. This clearly was improper:

> "Moreover, only the evidence and the reasonable inferences which support Appellee's theory may be considered. *Wilkerson v. McCarthy,* 1949, 336 U.S. 53; *Berry v. United States,* 1941, 312 U.S. 450." *Helene Curtis Industries Inc. v. Pruitt,* 385 F.2d 841, 850 (5th Cir. 1967); *cert. denied,* 391 U.S. 913 (1968).

Furthermore, that utilization of the testimony of Doubleday's witnesses was improper in several additional respects:

(a) The function of the appellate court was to determine whether there was sufficient evidence adduced by plaintiff-appellee to justify the jury's finding of knowing falsity or reckless disregard; it was not empowered to reevalue that evidence from its own remote viewpoint. Indeed, the jury had the right to disbelieve the testimony of every one of Doubleday's employees and other *ex post facto* witnesses especially Mary Hemingway, Valerie Hemingway and Alfred Rice, especially in view of their admissions, equivocations and fending with opposing counsel on the devastating cross-examinations.[13] See *e.g., Lavender v. Kurn,* 327 U.S. at 653, quoted *supra,* p. 8. This is so even if their testimony had been totally uncontradicted. *Powers v. Continental Casualty Co.,* 301 F.2d 386 (8th Cir. 1962); *Arkwright Mutual Insurance Co. v. Philadelphia Electric Co.,* 427 F.2d 1273, 1275 (3rd Cir. 1970); *cf. United States v. Massachusetts Bonding & Insurance Co.,* 303 F.2d 823, 827 (2nd Cir. 1962), *cert. denied sub nom., One Gustavsson Contracting Co., Inc. v. Browne & Bryan Lumber Co., Inc.,* 371 U.S. 942 (1962), *rehearing denied,* 372 U.S. 932 (1973). Mr. Justice Jackson stated in *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 628 (1944), *rehearing denied,* 322 U.S. 767 (1944):

> "This Court has said: 'The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be

13. In denying Doubleday's motion for judgment n.o.v. etc., the trial court noted: "On several occasions its [Doubleday's] efforts to do so ["hotly contest" Hotchner's proof of falsity] led it to sponsor evidence or witnesses such as Valerie and Mary Hemingway which was counter-productive." (Appendix, 13a).

> placed upon it. . . . That part of every case, such as the one at bar, belongs to the jury, . . . and so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.'"

(b) The testimony of Sister de Mola, who wrote her Ph.D. thesis on the *fictional* work of Castillo-Puche (593t), that he was an "important novelist," and Carrascal's testimony that Castillo-Puche was "one of the most important reporters in Spain" (Appendix, 3a) underlines the erroneous approach of the Court of Appeals inasmuch as such testimony was adduced for the first time at the trial and was not known to Doubleday at the time of publication when the cause of action arose.[14] *Cf. Goldwater v. Ginzburg, supra,* 414 F.2d at 344.

(c) Referring to the libellous comments about Hotchner's untrustworthiness, the Circuit Court said (Appendix, 8a):

> "As originally translated, Hemingway's words were: '[Hotchner is]dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him.' . . . as all the witnesses at trial agreed, the language used and sentiments expressed were not uncharacteristic of Hemingway."

Such statement is indeed contrary to the record not only to the testimony of Hotchner (289-290a) and Annie Davis (323a, 273t), Mary Schoonmaker (335-337a, 340a), but even that of Mary Hemingway, Doubleday's witness, who admitted she had never

---

14. Sister de Mola testified she first spoke to Doubleday long after publication of the offensive Book, and Carrascal said his first communication with Doubleday was four weeks before the trial.

heard Hemingway make a derogatory remark to Puche or anybody else about Hotchner (509, 534-535t), and stated that she had never heard her husband to be coarse or crude (575t). Mrs. Hemingway on redirect testified that prior to Hotchner publishing *Papa Hemingway*, she felt he was a very good and close friend of Hemingway (469t) and Valerie Hemingway, also a Doubleday witness, admitted on cross-examination that Hemingway regarded Hotchner as a close friend (425t).

By its decision herein, the Second Circuit has literally authorized and approved a novel rule that to our knowledge has no reported precedent — *viz.*, that a publisher, knowing of an author's virulent hatred of the plaintiff and warned by its own employee of the possibility of a libel suit and that it was doubtful that the truth of the scurrious statements could be substantiated "in any way", may nevertheless publish with impunity that defamatory matter without making the *slightest* effort to verify or even consulting its own lawyers. If defendant-appellant's conduct was not "reckless disregard" then that term is for all practical purposes rendered meaningless by this decision.[15]

---

15. The court conceded that Doubleday was "on notice of Castillo-Puche's animosity toward Hotchner" (Appendix, 7a), but apparently overlooked the rule that a mere assertion by a defendant that it believed the matter published by it to be true does not insure against liability, nor does a mere denial that it did not bear plaintiff personal ill-will or an allegation that the publication was made in good faith [incredible in the light of Doubleday's knowledge of its author's bitter hatred of Hotchner]. *St. Amant v. Thompson, supra*, 390 U.S. at 732; *Carson v. Allied News Co., supra*, 529 F.2d at 213-4; *Guam Federation of Teachers, Local 1581 AFL v. Ysrael, supra*, 492 F.2d at 439. Even the court in *Kapiloff v. Dunn*, the Maryland appeals case cited by the Second Circuit herein, acknowledged omission to investigate as a factor, saying at 269:

> "Although failure to check source material with experts may be one instance in a pattern of conduct showing complete disregard for the truth [citing *Butts* and *Goldwater*], we find no such pattern in the instant case."

See also the quotations from *Buckley v. Littell* and *Carson v. Allied News*, at p. 13, *supra*.

The Circuit Court says that "Doubleday's failure to conduct an *elaborate* independent investigation did not constitute reckless disregard of the truth"; and that "Doubleday could have inferred that Hemingway had affection and respect for Hotchner, but no means were *readily available* for verifying or discrediting Castillo-Puche's account" (Appendix, 8a; emphasis supplied). Respectfully, those statements are in complete disregard of the facts.

Doubleday already had "serious doubts" solidified by Austin's report (pp. 12-13, *supra*), *yet made absolutely no investigation whatever.* Editor Medina did all the abortive "toning-down" without help except from young non-lawyer Austin (252t); no one at Doubleday other than a copy editor read the entire translation (252t); Medina never questioned Puche's vicious remarks about Hotchner in the Spanish Work (253t), nor mentioned Hotchner to Lane (197a); no one at Doubleday read *Papa Hemingway,* much less compared it to either the translation or the galleys of the Book (257t) [if they had they would have found Hotchner lists those present in Pamplona and elsewhere in Spain the summer of 1959 (Exh. 28, pp. 234-5), and there is no mention of Castillo-Puche]; there was no consideration given by Medina or Doubleday of sending translations or galley proofs to any of the people mentioned by Puche as being friends and associates of Hemingway (255t); and no consideration given to showing the translation or galleys to Hotchner (256t) — or even asking him if he knew Puche — even though Medina wrote to Hotchner on March 13, 1973 (Exh. 22), requesting him to help in getting for Doubleday copies of Hemingway's three articles entitled "The Dangerous Summer" in *Life* Magazine (the "Life Articles") (229a), which articles also list the people at Pamplona — again no mention of Puche.[16]

16. The "*Life* Articles" certainly put Mrs. Medina on notice of the high regard in which Hemingway held Hotchner (see Exh. 29B and C). Puche quotes the Life Articles throughout the Book.

The most rudimentary of investigations would have uncovered information such as induced the trial court to state (in denying Doubleday's motion to dismiss at the close of the plaintiff's case)

> "I must say that some of this evidence would warrant a conclusion that this book is a total fake" (342a),

and, in the course of Doubleday's case, to say to counsel at the bench:

> "There is sufficient evidence in this record already to lead me to regard Puche as a liar . . ." (592t).

The major portion of the Book (that portion in which Hotchner is libelled) deals with the Festival in Pamplona in 1959. Published in 1974, it certainly was not "hot news". More than four years elapsed from the time Doubleday acquired the English rights to Puche's book to the time it published the Book. Obviously, the more time to investigate, the more the possibility of liability where defendant failed to properly do so. Thus it was said in *Goldwater v. Ginzburg, supra,* 414 F.2d at 339:

> "The Goldwater article did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigation techniques; . . .."

Cf. *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), at p. 157:

> "The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored."

See also, *Carson v. Allied News Co., supra,* 529 F.2d at 211.[17]

The Second Circuit's decision also further diminishes the "reckless disregard" principle by introducing another novel concept, *i.e.*, "an assertion that cannot be proved false cannot be held libellous" (Appendix, p. 6a). "Incapability of independent verification" (*ibid.*, page 8a) not only opens the door wide but is indeed an *imprimatur* for unbounded libel by allowing a publisher to issue defamatory matter as the word of a dead man who is not available to denounce the lie. In the case at bar, while of course the deceased Hemingway could not testify, there was ample convincing indicia of unreliability available to Doubleday by simple references to his "LIFE" articles and inquiry to the readily available other Hemingway intimates such as Bill and Annie Davis referred to in the Puche Book and elsewhere, as well as comparison with Hotchner's *Papa Hemingway.*

Exception must also be taken to the Second Circuit's statement that "a writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." (*ibid.*, pp. 6a-7a). The

---

17. The Second Circuit said "Doubleday's editor did confirm with Castillo-Puche that he stood by his account of the incident" *(ibid.*, p. 8a), but her letter of August 6, 1973 (Exh. 11), is clear that she did not write for confirmation but merely for permission to delete the most scandalous matter, consoling him that even with the deletions and toning down "*I* certainly won't make Hotchner look marvelous" (emphasis supplied). Such language indicates not merely "reckless disregard" but actual participation and cooperation. Whether Puche's reply was more of a consent to lessening the possibility of a libel suit than a confirmation was again, a matter for the jury to decide.

governing New York law set forth in such leading cases as *Triggs v. Sun Printing & Publishing Association*, 179 N.Y. 144, 154-55, 71 N.E. 739, 742-3 (1904), is that the privilege of fair comment (criticism) is based on good faith and does not carry with it an unlimited license of vindictive unreasonable personal attack.[18] The First Amendment decisions have not rendered it inapplicable to this case:

> "The so-called privilege of fair comment is conditional and may be vitiated by proof of actual malice, i.e., knowing falsity or reckless disregard." *Curtis Publishing Co. v. Butts, supra,* 388 U.S. at fn. 152.

In *Goldwater v. Ginzburg, supra,* 414 F.2d at 341-2, it was held:

> "The *Times* decision changed state libel law only to the extent of requiring public officials to prove actual malice with convincing clarity. . . . The evidence submitted in *Sullivan* only showed the defendant newspaper had leveled an impersonal attack on certain government operations . . . the derogatory articles, statements and cartoons Fact published were leveled at Senator Goldwater personally."

New York Times v. Sullivan and subsequent decisions of this Court support free expression of honest ideas of political-sociological interest — they do not authorize vicious personal character attacks under the guise of opinion. Thus in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) it is said:

> "But there is no constitutional value in false statements of fact. Neither the intentional lie nor

---

18. As in the case at bar, plaintiff's appearance and conduct were attacked.

> the *careless error* materially advances society's interest in 'uninhibited, robust and wide-open debate on public issues'". (emphasis supplied).

In *Buckley v. Littell, supra,* while the Court revised a portion of a judgment based on an attack upon the political views of the plaintiff, it affirmed with respect to statements regarding his ability as a journalist, and declined to go behind the findings below of reckless disregard (see quotation *supra,* p. 10). The Court also said (pp. 896-897):

> "In short, whatever might be said of a person's political views, any journalist, commentator or analyst is entitled not to be lightly characterized as inaccurate and dishonest or libelous. We cannot disagree with the finding of the court below that it is 'crucial' to such a person's career that he or she not be so treated."[19]

In a nutshell, freedom of speech is to encourage circulation of ideas of social value — it is not intended to protect character assassination.

In the case at bar, all six passages found by the jury to be libellous and to have been published by Doubleday in reckless disregard of the truth reflected on personal qualities of Hotchner. They certainly are not an exposition on topics of "enormous public interest" such as "democracy against totalitarianism and about the continuation of the freedom of religious worship" referred to in *Buckley v. Littell, supra,* 539 F.2d at 889. They patently are a nasty personal attack on the man who is widely known as Hemingway's trusted confidante and advisor and one of his most intimate friends.

---

19. There can be no question that the slurs in the Book of hypocrisy and untrustworthiness under the circumstances of the case at bar are libellous *per se* under New York law, and even Doubleday did not argue otherwise in its brief in the Circuit Court.

The matter of fair comment and bona fide opinion versus actionable personal attacks is a matter for the jury. See *e.g., Sun Publishing, supra; Cheatham v. Wehle,* 5 N.Y.2d 598, 615, 159 N.E.2d 166 (1959). So also in *Corrigan v. Bobbs-Merrill Co., supra,* 228 N.Y. at 71-72, with facts strikingly similar to here, it was held for the jury to find recklessness in the editor's indifference as to whether the "author's diatribes were intended as mere generalizations or as offensive personalities, and, if the latter, whether they were fair criticism or malicious falsehood."

* * *

Judge Haight recently said in *Herbert v. Lando* (S.D.N.Y. 74 Civ. 434, 1/4/77, ____ F. Supp. ____):

> "The concept of 'reckless disregard for truth' inevitably carries the trier of the facts into the thought processes of the defendant: the evaluation and balancing he made of conflicting information available to him; the misgivings he may have suppressed when deciding to publish." (p. 9 of typed opinion).

Surely a finding by a jury of "reckless disregard" upheld by the trial court is not to be overturned by an appellate court where, as here, there was clear and convincing evidence substantiating it. As this Court said in *Tennant v. Peoria & P.U. Ry. Co.,* 321 U.S. 29, 35 (1944):

> "It is not the function of a court to search the record for conflicting circumstantial evidence. . . . The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert

> instructions, and draws the ultimate conclusions as to the facts. . . . That conclusion . . . cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

III.

THE REVERSAL BY THE SECOND CIRCUIT WAS CLEARLY IN CONTRAVENTION OF THE SEVENTH AMENDMENT.

The facts found by the jury in this Hotchner case were not merely re-examined by the Second Circuit — they were redetermined.

The conduct of that Court as discussed at length in Reason II, *supra,* was clearly in violation of the Seventh Amendment to the Constitution of the United States. As this Court said in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., supra,* 369 U.S. at 358-359:

> "But neither we nor the Court of Appeals can redetermine facts found by the jury. . . . For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"

See also *e.g., Moore v. Guthrie Hospital, Inc.,* 403 F.2d 366 (4th Cir. 1968); *Arkwright Mutual Insurance Co. v. Philadelphia Electric Co., supra,* 427 F.2d at 1275; *Powers v. Continental Casualty Co., supra,* and many others. Indeed, it was recently said in *Gonzales v. Missouri Pacific R.R. Co.,* 511 F.2d 629, 633 (5th Cir. 1975), that the Seventh Amendment "mandates" the

appellate court to search for a view of the case that would justify upholding the jury's verdict (as in the case at bar, a special verdict), citing this Court's decision in *Atlantic & Gulf Stevedores, Inc., supra.*

CONCLUSION

The writ of certiorari should be granted.

New York, N.Y.
June 14, 1977

Respectfully submitted,

s/ Mervin Rosenman
Attorney for Petitioner

Simon J. Hauser
Of Counsel

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 674—September Term, 1976.

(Argued February 14, 1977 Decided March 23, 1977.)

Docket No. 76-7479

A. E. HOTCHNER,

Plaintiff-Appellee,

—v—

JOSE LUIS CASTILLO-PUCHE,

Defendant,

—and—

DOUBLEDAY & COMPANY, INC.,

Defendant-Appellant.

Before:

LUMBARD and TIMBERS, *Circuit Judges,*
and WYATT, *District Judge.**

Appeal from judgment for libel and invasion of privacy entered by Judge Brieant in the Southern District on a jury verdict.

Reversed.

* Sitting by designation.

MERVIN ROSENMAN, New York, N.Y. (Simon J. Hauser, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

ROBERT M. CALLAGY, New York, N.Y. (Satterlee & Stephens, James F. Dwyer and James F. Rittinger, New York, N.Y., on the brief), *for Defendant-Appellant.*

HENRY R. KAUFMAN, New York, N.Y., on the brief, *for Amicus Curiae, Association of American Publishers, Inc.*

LUMBARD, *Circuit Judge:*

Doubleday & Company, Inc. appeals from a judgment of $1 compensatory damages and $125,000 punitive damages for libel and invasion of privacy entered by Judge Brieant on a jury verdict after a one-week trial in April 1976 in the Southern District. The plaintiff is A. E. Hotchner, a successful writer and lecturer who was a friend of Ernest Hemingway's and published a memoir about him, *Papa Hemingway*, in 1965. The suit involves unfavorable remarks about Hotchner made in *Hemingway in Spain*, an English translation of personal reminiscences by a Spanish writer Jose Luis Castillo-Puche, which was published by Doubleday in 1974.

The district court determined that for first amendment purposes Hotchner in his relationship with Hemingway was a public figure.[1] Liability must therefore rest on clear and convincing proof that the defendant published with knowledge of falsity or with reckless disregard for truth.

---

1 *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041, 1043-47 (S.D.N.Y. 1975). Hemingway has been acclaimed as one of the greatest American authors. He won the Pulitzer Prize for his *The Old Man and the Sea* in 1953 and the Nobel Prize for Literature in 1954.

Because the evidence on this issue is inadequate to support the jury's verdict, we reverse with instructions that plaintiff's amended complaint be dismissed.

Castillo-Puche's *Hemingway: Entre la Vida y la Muerte* was published by Ediciones Destino in Spain in 1967. The book collects in 388 pages the author's impressions of Hemingway which were garnered in Spain and Cuba in the late 1950's. It makes roughly twenty references to Hotchner, who was a travelling companion of Hemingway's in Spain.

At trial, a professor of Spanish who had written her Ph.D. thesis on Castillo-Puche testified that he had written a number of novels, earning several literary awards and establishing himself as "an important novelist." She also described Ediciones Destino as a "very prestigious" publisher. A journalist employed by a major Spanish newspaper testified that Castillo-Puche was "one of the most important reporters in Spain."

Doubleday editor Kathryn B. Medina testified that she first became interested in the book after it was favorably mentioned in the *Saturday Review* in 1969. She asked two experienced literary critics to read the Spanish version, and both returned with positive reports on it. Doubleday proceeded to acquire the English-language rights to the book from Ediciones Destino and to engage an experienced translator, Helen Lane, for the translation.

In editing Lane's translation, Medina noticed that the book contained very uncomplimentary references to Hotchner. She had the passages reviewed by William Austin, a member of the Doubleday contracts department, and between them they agreed that some eleven statements should be eliminated or toned down.[2] Medina relayed this

---

2 In his memo to Medina recommending changes, Austin wrote:

> When looked at together these statements certainly ridicule Hotchner and impugn his reputation and character. As he seems

proposal to Castillo-Puche by letter. He vouched for the statements but accepted the suggested modifications.[3]

As published in 1974, the translation contained six passages which the jury ultimately found to be libellous. In five of these Castillo-Puche describes Hotchner as a manipulator, a "toady," a "hypocrite" who exhibited "two-faced behavior" toward Hemingway's true friends and "put up a very good front as [Hemingway's] mild-mannered, obedient servant," an "exploiter of [Hemingway's] reputation" who was "never open and above board." The sixth passage is one in which Hemingway, referring to Hotchner, tells Castillo-Puche: "I don't really trust him, though."

At trial, Hotchner testified at length regarding his close friendship with Hemingway. He produced letters from Hemingway containing expressions of appreciation and devotion. Three other members of Hemingway's circle testified that Hemingway had the greatest respect and affection for Hotchner.

Hotchner also testified that he never met Castillo-Puche. Hotchner knew no Spanish; Castillo-Puche knew no English. Hotchner and another member of Hemingway's entourage in Spain, Annie Davis, testified that at many of the occasions described in the book Castillo-Puche had not been present. They said that Castillo-Puche could have

---

to be an author who has worked in movies and TV, this could be a serious matter.

To make matters worse I doubt whether any of these statements can be substantiated in any way.

From reading the pages you sent, this treatment borders on "malice", which together with "reckless disregard for the truth", is a prime element in any libel action.

3 The manuscript was later read by a Doubleday copy editor checking for intrinsic errors. He found no internal inconsistencies such as might call into question any of Castillo-Puche's allegations concerning Hotchner.

been among the hordes of people who had brief contact with Hemingway in a bar in Pamplona during the bullfighting festival in 1959. Hemingway's widow and daughter-in-law, testifying on behalf of Doubleday, said that Castillo-Puche had been a friend of Hemingway's and had been present with Hemingway and his companions on a number of occasions. Also introduced at trial were the Spanish and English editions of Castillo-Puche's book; these contain a number of photographs of Castillo-Puche with Hemingway and, on at least one occasion, with Hotchner and Hemingway.

On the libel count, the jury returned answers to written interrogatories regarding nineteen alleged libels. It found that all the elements of liability had been proved against Doubleday in six instances. The jury also returned answers to written interrogatories on the invasion of privacy count, finding that Doubleday had knowingly portrayed Hotchner in a false light or as a participant in fictionalized events or conversations. The jury found Hotchner entitled to recover $1 on each count as compensatory damages and $125,000 as punitive damages. On July 30, 1976, Judge Brieant denied Doubleday's motion for judgment n.o.v. or remittitur.[4] On September 1, judgment was entered in favor of Hotchner for $125,002, with costs to be taxed. This appeal by Doubleday followed.

When a public figure sues for defamation, the first amendment bars recovery unless the defamatory falsehoods were made with knowledge of falsity or with reckless disregard for the truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 162-65 (1967) (opinion of Warren, *C.J.*); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80

4 Judge Brieant granted Castillo-Puche's motion that the action against him be dismissed for want of personal jurisdiction.

(1964). The same standard applies if the public figure sues for invasion of privacy. *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 249 (1974); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). The proof must be "clear and convincing"; a mere preponderance of the evidence is not enough. *Gertz* v. *Robert Welch, Inc.*, supra at 342; see *New York Times Co.* v. *Sullivan*, supra at 285-86. "[R]eckless disregard of the truth [means] subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Gertz* v. *Robert Welch, Inc.*, supra at 335 n.6, quoting *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). Mere negligence is not actionable.

These strict tests may sometimes yield harsh results. Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech. Such adequate safeguards for free speech inevitably result in reduced protection against printed statements which otherwise would be held to be libellous. To ensure that proper weight has been given to the protection of first amendment rights, it is important that the court make "an independent examination of the whole record" in scrutinizing a jury finding of scienter in a libel case. *Buckley* v. *Littell*, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3489 (U.S. Jan. 17, 1977).

An assertion that cannot be proved false cannot be held libellous. A writer cannot be sued for simply expressing

his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. See *Gertz* v. *Robert Welch, Inc.*, supra at 339-40; *Buckley* v. *Littell*, supra at 893. Thus, Castillo-Puche's characterizations of Hotcher cannot, if viewed in isolation, constitute actionable libel.

Liability for libel may attach, however, when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact. In this case, the jury could reasonably have found that, contrary to the impression of intimacy conveyed by his book, Castillo-Puche's actual contact with and first-hand knowledge about Hotchner was virtually nil.

Opinions based on false facts are actionable only against a defendant who had knowledge of the falsity or probable falsity of the underlying facts. See *Kapiloff* v. *Dunn*, 27 Md. App. 514, 343 A.2d 251, 263 (1975), cert. denied, 426 U.S. 907 (1976). Doubleday had no cause for serious doubts on this score. Several photographs of Castillo-Puche with Hemingway and at least one with Hotchner and Hemingway, the reputations of Castillo-Puche and of his Spanish publisher, and the book itself all seemed to indicate that Castillo-Puche's opinions of Hotchner were based on personal observations. Castillo-Puche's allegations were not of such an extraordinary nature as would suggest a high probability of falsity; he made no claims that Hotchner had engaged in any unusual or outlandish conduct. While Castillo-Puche's denunciations of Hotchner were sufficient to put Doubleday on notice of Castillo-Puche's animosity toward Hotchner, there was no reason to believe that Castillo-Puche had never really observed

Hotchner. Knowledge of an author's ill-will does not by itself prove knowledge of probable falsity. Cf. *Goldwater* v. *Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969). Thus, the evidence does not demonstrate that Doubleday had cause seriously to suspect that Castillo-Puche's opinions of Hotchner were without foundation. Doubleday's failure to conduct an elaborate independent investigation did not constitute reckless disregard for truth. Cf. *St. Amant* v. *Thompson*, supra at 733; *New York Times Co.* v. *Sullivan*, supra at 287-88.

As for the sixth alleged libel, the statement about Hotchner purportedly made to Castillo-Puche by Hemingway, the record does not support a conclusion that Doubleday published with serious doubts about the authenticity of Castillo-Puche's version. As originally translated, Hemingway's words were: "[Hotchner is] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." There was no clear and convincing evidence that Doubleday knew or even suspected that this conversation was a fabrication. From Hotchner's own *Papa Hemingway*, Doubleday could have inferred that Hemingway had affection and respect for Hotchner, but no means were readily available for verifying or discrediting Castillo-Puche's account. The incident itself is believable and, as all the witnesses at trial agreed, the language used and sentiments expressed were not uncharacteristic of Hemingway. Doubleday's editor did confirm with Castillo-Puche that he stood by his account of the incident. Where a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth.

Appellee contends that Doubleday should be liable simply because it knowingly published a bowdlerized version of Hemingway's alleged statement. We disagree. It is true

that in transforming Hemingway's words to the much milder "I don't trust him," Doubleday was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement about Hotchner. If Doubleday could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive to Hotchner.

Thus, there was no evidence from which the jury might reasonably have found that the defendant published the alleged libels with knowledge of falsity or reckless disregard for truth. The judgment is reversed; we remand to the district court for entry of judgment dismissing the amended complaint.

MEMORANDUM OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 5516-CLB

A. E. HOTCHNER,

Plaintiff,

-against-

JOSE LUIS CASTILLO-PUCHE and DOUBLEDAY & COMPANY, INC.,

Defendants.

DOUBLEDAY & COMPANY, INC.,

Defendant and Third-Party Plaintiff,

-against-

EDICIONES DESTINO S. L.,

Third-Party Defendant.

Brieant, J.

On April 30, 1976, a jury submitted its Special and General Verdict in this action brought under New York law to recover damages for (1) libel and defamation, and (2) invasion of privacy. The jury found for plaintiff A. E. Hotchner on both claims pleaded. and made a non-cumulative award on each claim, of $1.00 compensatory damages, and $125,000.00 in punitive damages. Familiarity with the findings of the Special Verdict is assumed.

Memorandum Opinion of the District Court

Entry of a judgment was deferred pending (1) motion by defendant Doubleday & Company, Inc. for judgment n.o.v. pursuant to Rule 50(b), F.R.Civ.P., or alternatively, pursuant to Rule 59(a), for a new trial on general grounds, and also excessiveness; (2) motion by plaintiff that the Court treat the trial record as an inquest and enter judgment against the defaulting co-defendant, Jose Luis Castillo-Puche ("Puche"); (3) motion by Puche to be relieved of his default and to dismiss the action as against him for want of personal jurisdiction; (4) resolution of the issues presented by the third-party complaint.

Doubleday's Motion

Most of the points raised in Doubleday's motion require little consideration. We rely on the trial record. At least insofar as the question of liability is concerned, we think the proof more than adequate to support the detailed and carefully considered special findings of our attentive and diligent jury. Our jury could and did find, as to those of Hotchner's claims which it found actionable, that clear and convincing evidence showed Doubleday published with reckless disregard for their truth or falsity. Indeed, for the most part this clear and convincing evidence is documentary and comes from Doubleday's files, or was in possession of persons whose knowledge the jury could reasonably impute to Doubleday.

Even in a defamation case, involving as it does, the requirement that "actual malice" be proved by "clear and convincing evidence," a standard higher than the ordinary civil action but less than that of a criminal trial, every fair intendment should be given to a jury verdict. The Special Verdict shows intrinsically that our jury deliberated carefully, and made distinct and discerning determinations of fact, as the Constitution contemplates. More than a mere disagreement with or dislike for the result must be shown for us to disturb it.

Memorandum Opinion of the District Court

The question of the amount of damages bears further discussion.

Apparently, the life style and experiences of Ernest Hemingway, and his classic works of fiction remain a matter of great interest to students and the public generally. He seems to be regarded as a latter day Kipling, whose India is Spain. Why the life of this rich libertine and destroyer of wildlife should be of such great and continuing public interest a decade following his suicide, we cannot, and need not say.

Hotchner, as a result of his association with Hemingway, and his status as friend and confidante has achieved great personal fame and financial success. He has earned large sums of money, first as an adapter of Hemingway's fiction for motion pictures and television, and later as author of a best selling book recounting biographical anecdotes and his own experiences with Hemingway, entitled "Papa Hemingway," published before Puche's book. He has lectured on the subject, appeared on radio and television, and has since written a similar book about "Doris Day," a show-business personality, which was on the non-fiction bestseller lists at the time of trial.

The Puche book attacks his worth and status as an authority on Hemingway. That it did so was clear to Doubleday prior to publication. See, *inter alia,* Exhibits 7, 9, and 11.

Our jury perceived, correctly, that Hotchner had no direct financial loss due to the libel. He proved no lost employment or revenue directly flowing therefrom. His reputation as a Hemingway savant, an asset from which he has earned much money, is tarnished somewhat, and continues so, because 891 copies of Puche's libelous book "Hemingway in Spain" are lodged in the reference shelves of libraries and colleges. During a radio interview in Pittsburgh, Hotchner was taxed for being a charlatan as to his relationship with Hemingway, by a student

caller who quoted from and relied on defendant's book. To this extent, his capacity and status is damaged, and the award of some compensatory damages therefor would not have been unreasonable. Also, clearly Hotchner's on our jury's version of the facts was entitled to some damages for humiliation and mental anguish. In weighing whether the punitive damages are excessive, we may also consider that the compensatory damages are inadequate. Undoubtedly our jury intended the punitive award to do double duty, and salve his humiliated amour-propre.

As guardians of the community conscience our jurors fixed the amount of damages. The totality of their actions is not unreasonable. Doubleday, a prominent publisher with a full staff and active list can hardly be compared with the impecunious theologian as to whom an award was reduced in *Buckley v. Littell,* Dkt. 75-7358 (2d Cir. June 30, 1976). As smart money here, the amount is not excessive for this defendant.

Also, it is no windfall for this plaintiff who must pay income taxes thereon, as well as substantial legal fees, the full magnitude of which is not yet known. If we regard the social purpose of libel litigation as vindication, Hotchner's road to vindication was tortuous, costly and beset with travail. This is not a case like *Buckley, supra,* in which the publisher attempted to withdraw the offending work. Here there was no apology—indeed, instead of apologising, conceding Puche's falsity and litigating only the question of its own reckless disregard before the jury, Doubleday here hotly contested Hotchner's proof of falsity. On several occasions its efforts to do so led it to sponsor evidence or witnesses such as Valerie and Mary Hemingway which was counterproductive.

One more point requires discussion with respect to Doubleday's motion. The *Buckley* case, *supra,* was decided by our Court of Appeals after we had instructed the jury in this

case. We find nothing therein which requires a new trial here. *Buckley* holds (p. 4608):

> "The law of defamation has in effect been rewritten in the light of the constitutional imperatives.[3] [3. *See* Eaton, *The American Law of Defamation Through Gertz v. Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1364, et seq. (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.,* 54 U. Tex. L. Rev. 199 (1976). For one of the early recognitions of the transmutation of the law of defamation into a subject of constitutional imperatives *see* Kalvan, *The New York Times Case: A Note on the Central Meaning of the First Amendment,* 1964, S. Ct. Rev. 191.
>
> The district court, unfortunately, did not approach the task of interpreting the debatable meaning of the alleged libels in the light of the imperatives of 'uninhibited, robust, and wide-open' debate, *New York Times Co. v. Sullivan,* 376 U.S. 254, 271 (1964), but only discussed their implications once its search for the 'proper interpretation' of [the libelous Work] had ended. 393 F.Supp. at 925, 931, 942.] *See* Restatement (Second) of Torts, Special Note at 3 (Tent. Draft No. 21, 1975)."

We doubt the foregoing was intended to be construed literally. The Supreme Court does not impose or interpret the law of defamation; the states do. All that the Supreme Court has purported to do is set constitutional limits, unfortunately shifting ones, found mostly in dicta, beyond which a state is prevented by the Constitution from applying its own substantive

law. *Cf. Rosenbloom v. Metromedia, Inc.*, 403 U.S. 529 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *Time Inc. v. Firestone*, 44 U.S.L.W. 4262 (1976).

New York's state legislature could consign the libel action to that historical dustbin in which it has placed civil actions for criminal conversation, seduction, alienation of affections and breach of promise of marriage [§80-a New York Civil Rights Law, as enacted originally in Ch. 263 L. 1935]. Until it does so, the rule of *Mencher v. Chesley*, 297 N.Y. 94, (1947), and the other traditional rules retain their full force in this diversity case, subject only to the most recent applicable Supreme Court ruling on the Constitutional limitations. The only rulings of the latter sort which are relevant here are that as to a public figure, one additional element, solely federal, infelicitously described as "actual malice" must be present in the state tort, and it must be found to be so by a special standard or level of proof, "clear and convincing evidence," as was charged here.

Doubleday's motion is denied in all respects.

Castillo-Puche's Motion

Jose Luis Castillo-Puche was served with our process personally in Spain where he resides. He is a Spanish subject. He defaulted, but after the trial had begun, the record of which the Court intended to treat as an inquest, the attorneys for the Spanish Consul appeared specially for him, to vacate service.

In effecting service, plaintiff relied on §302 New York Civil Practice Law and Rules, applicable here under Rule 4(d)(7) and 4(f), and *Legros v. Irving*, 38 A.D.2d 53 (1st Dept. 1971), and its progeny.

These cases are distinguishable. Here, Doubleday acquired the defamatory work from Ediciones Destino, S.L., not from

Puche. On the entire trial record, Puche's presence and his activities in New York were minimal. His correspondence with Doubleday from Spain consenting to revisions, and his visit to its New York office, correctly styled as a mere courtesy call in the affidavit of Kathryn B. Medina, sworn to May 27, 1976, do not rise to the level of "doing business" in New York under §302(1), CPLR. In the other subsections of §302, actions for defamation are specifically excluded.

The Third-Party Complaint

The Court regards this pleading as abandoned and it is dismissed without prejudice.

Conclusion

The Clerk of the Court, pursuant to Rule 58, F.R.Civ.P. shall enter judgment in favor of plaintiff against defendant Doubleday & Company, Inc. for the sum of $125,002.00 and taxable costs, and that the complaint is dismissed without prejudice as to defendant Jose Luis Castillo-Puche for want of personal jurisdiction over that defendant, and that the Third-Party Complaint is dismissed without prejudice.

So Ordered.

Dated: New York, New York
July 30, 1976

CHARLES L. BRIEANT
CHARLES L. BRIEANT
U. S. D. J.

MEILEN PRESS INC — N. Y. C. 219

Supreme Court, U. S.
FILED
AUG 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1977

No. 76-1804

A. E. HOTCHNER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT DOUBLEDAY & COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES F. DWYER
ROBERT M. CALLAGY
JAMES F. RITTINGER
Attorneys for Respondent
Doubleday & Company, Inc.
277 Park Avenue
New York, New York 10017
Tel. (212) 826-6200

SATTERLEE & STEPHENS
Of Counsel

TABLE OF CONTENTS

PAGE

Table of Authorities i

Question Presented 2

Counter Statement of the Case 3

Reasons for Not Granting Certiorari 7

Point I—

The United States Court of Appeals for the Second Circuit followed the established principles of this Court first enumerated in *New York Times Co.* v. *Sullivan* in holding that as a matter of law Hotchner failed to prove by clear and convincing evidence that Doubleday published the allegedly libelous statements with knowledge of falsity or with reckless disregard for their truth or falsity 7

Point II—

Various other reasons not reached by the Second Circuit also mandated that the jury verdict be vacated 29

Conclusion 30

Table of Authorities

Cases:

Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976) *cert. denied* —— U.S. ——, 45 U.S.L.W. 3489 (U.S. Jan. 17, 1977) 9, 16

PAGE

Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) 15, 18
Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920) 20n
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 4, 19

Garrison v. Louisiana, 379 U.S. 64 (1964) 28
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 4, 15, 15n, 18
Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972) 9
Goldwater v. Ginzburg, 414 F.2d 324 (2nd Cir. 1967) .. 19
Guam Federation of Teachers Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974) 7, 8

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 28

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)..2, 4, 8, 9, 15, 28

Rinaldi v. Holt, Rinehart & Winston, Inc., 178 N.Y.L.J. No. 16, p. 1 *et seq.* (July 25, 1977) (N.Y. Ct. Appeals: 1977) 16

St. Amant v. Thompson, 390 U.S. 727 (1968) 18

Statutes and Other Authorities:

Section 51, New York Civil Rights Law 29

United States Constitution—
First Amendment 9

IN THE

Supreme Court of the United States

October Term 1977

No. 76-1804

A. E. HOTCHNER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT DOUBLEDAY & COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition of A. E. Hotchner (Hotchner) seeks review of a unanimous opinion of the United States Court of Appeals for the Second Circuit (Lombard, Cir. J.) dated March 23, 1977 (551 F. 2d 910; Pet., p. 1a). The opinion reversed a judgment entered on September 1, 1976 following a trial in the United States District Court for the Southern District of New York (Brieant, J.) in which a jury returned a verdict in favor of Hotchner for $1.00 compensatory damages on each of two counts (libel and invasion of privacy) contained in the complaint and $125,000.00 in punitive damages on each count but not both.

Question Presented

Hotchner's petition (pp. 2-3) enumerates four questions, with sub-parts, for review. What is manifest from the tenor of these questions is that the only issue before this Court is whether there was sufficient evidence to sustain the jury verdict according to the strict standards first imposed by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Parenthetically, we note here and *infra* that each of Hotchner's questions is replete with statements and assumptions which, as the record and the Second Circuit opinion substantiate, simply do not reflect what occurred at trial or on appeal.

Since the questions presented by Hotchner are duplicative and confusing, Doubleday restates, pursuant to Rule 40(3) of the Supreme Court Rules, the question presented for review as follows:

> Whether the United States Court of Appeals for the Second Circuit was correct in reversing the jury verdict below since as a matter of law "there was no evidence from which the jury might reasonably have found that Doubleday published the alleged libels with knowledge of falsity or reckless disregard for truth." (551 F. 2d 910, 914; Pet. 9a).[1]

---

[1] Doubleday presented numerous other reasons to the Second Circuit to warrant reversal of the jury verdict. Since the Second Circuit's reversal was granted on the threshold question of liability, the other reasons warranting reversal were not reached or discussed by the Second Circuit. These will be discussed briefly at the conclusion of Doubleday's brief herein.

Counter Statement of the Case

The subject of this action is certain statements, identified below, which appear in *Hemingway in Spain* (the "Book") (Exhibit 1, 6a[2]), an English language translation of a work originally published in the Spanish language in Spain in 1967 entitled *Hemingway: entre la vida y la muerte* (the "Spanish work"). (Exhibit 26, 7a) The Spanish work was written by the noted Spanish journalist and author Jose Luis Castillo-Puche ("Castillo-Puche") and published by the important Spanish publisher Ediciones Destino ("Destino"). The Book is a personal reminiscence by Castillo-Puche about the time he spent with Hemingway in Spain and Cuba and his analysis of the relationship which existed between Hemingway and Spain. There are seventeen references in the 388 page Book to Hotchner, who was a traveling companion of Hemingway in Spain. Hotchner's complaint (12a) objected to these references and to two others that did not refer to him. The jury found that Hotchner had been defamed by only six, namely: that Hotchner was: (1) a "toady", (152a), (2) a "hypocrite", (154a), (3) "an exploiter of Hemingway", (156a), (4) that Hemingway said of him "He's a little precious, but he's a very smart cookie" . . . "I don't really trust him though", (157a), (5) that because Hotchner had earned lots of money for Hemingway he "had been motivated by something other than worshipful admiration for a great writer", (164a) and (6) that Hotchner was a "ridiculous" figure who "hung around" Hemingway and exploited the latter's reputation even though he [Hotchner] "may have seriously thought he was looking after [Hemingway's] interests and protecting him" (166a).

---

[2] "a" references are to the Appendix in the Court of Appeals; "t" references are to pages from the trial record.

Doubleday, after learning of the Spanish work from a favorable review which appeared in the *Saturday Review* (Exh. P, 245a, 345-464a) and obtaining written opinions and critiques from two independent Hemingway experts (Exhs. Q and R, 246-48a, 347-348a) acquired the English language rights to the Spanish work pursuant to an agreement with Destino dated May 18, 1970 (201a). Doubleday hired Helen Lane, an award-winning translator, to translate (249a) the Spanish work into literary English and published her translation in the United States in 1974 (Exhibit 1, 6a). Only 7,500 copies were printed, of which less than half (3,488 copies) have been sold (195a). Doubleday lost money on the Book.

Hotchner, a well-known writer and lecturer, was held by the district court to be a public figure for purposes of litigation concerning his relationship with Ernest Hemingway. No objection is or has been taken from this ruling. (404 F. Supp. 1041; 110a) It was, in fact, Hotchner's own story of his relationship with Hemingway, *Papa Hemingway*, which first earned him a national reputation. When a public figure sues for libel, the First Amendment bars recovery unless the plaintiff proves that the defamatory statements were made with knowledge of falsity or with reckless disregard for the truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 162-65 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964).

It was clear beyond peradventure, as even Hotchner's counsel and the trial judge recognized, that Hotchner had failed to prove at trial that Doubleday published the statements referring to him with knowledge that they were false. (342a) Consequently, Hotchner's case depended upon proof that Doubleday had published the statements with reckless disregard of whether they were false or not. His

principal evidence in this regard consisted of an inter-office memorandum (Exhibit 9, 214a) from Doubleday's files in which the assistant contracts manager recommended to the editor in charge of the book that certain statements be deleted, modified or toned down. This recommendation was adopted by the editor, who revised the offensive material (Exhibit 5A-5G, 203a-210a) and in the course thereof obtained the approval of the Spanish author to the same (Exhibit 12, 219a), the author stating that while he consented to any revision which Doubleday thought necessary to avoid libel litigation, he nonetheless reaffirmed the truth of the statements made about Hotchner. Hotchner testified, of course, that none of the statements made about him was true. The sum of the testimony of his other witnesses was simply that, although they had no knowledge of the particular circumstances to which the statements referred, it was the opinion of each that, based upon what each knew about the relationship between Hotchner and Hemingway, the author's statements were not accurate. There was other testimony from these witnesses concerning certain innocuous non-defamatory statements unrelated to Hotchner which were claimed to be inaccurate, but there was no testimony that Doubleday either knew or was aware of any such inaccuracy.

Doubleday called witnesses to prove (i) that it had no knowledge of the alleged falsity of the statements and had acted reasonably in revising statements about Hotchner, (ii) that it had learned of the Spanish work from a reputable source and that it had the Spanish work reviewed by two independent Hemingway experts who expressed no doubt about the Book's accuracy, (iii) that the translator of the work was highly regarded, (iv) that persons closest to Hemingway, his wife and secretary, believed that the author's stated opinions about Hotchner were reasonable

and that the statements attributed to Hemingway about Hotchner would not have been out of character for Hemingway to have made, and (v) that Castillo-Puche, the author, was one of Spain's foremost writers and the recipient of prizes for his writing and journalism (590t), and that the Spanish publisher Destino was a reputable and prominent publishing house in Madrid (600t). The trial record establishes not only that there was a failure by Hotchner to prove that Doubleday had published recklessly—not caring whether the statements were true or false—but, moreover, that the testimony of the Doubleday witnesses showed that Doubleday had acted reasonably under the circumstances and entertained no serious doubt as to the truth of the statements made about Hotchner.

REASONS FOR NOT GRANTING CERTIORARI

POINT I

The United States Court of Appeals for the Second Circuit followed the established principles of this Court first enunciated in *New York Times Co.* v. *Sullivan* in holding that as a matter of law Hotchner failed to prove by clear and convincing evidence that Doubleday published the allegedly libelous statements with knowledge of falsity or with reckless disregard for their truth or falsity.

Hotchner's petition, in a contrived and distorted presentation of the law and record, argues for certiorari on the following theory: the Second Circuit reversed his two dollar compensatory damage and $125,000 punitive damage jury verdict, therefore: the Second Circuit tried the case *de novo,* reviewed the evidence in a light most favorable to Doubleday, drew all inferences in favor of Doubleday and, denied Hotchner his constitutional right to a jury trial. This contention ignores the traditional function of an appellate court in reviewing a jury verdict.

Hotchner's attorneys recognize that Supreme Court Rule 19 provides that consideration for review on certiorari will be given when the decision appealed from is in conflict with a decision of another Court of Appeals. Thus, they contend that the Second Circuit opinion in this action is in conflict with *Guam Federation of Teachers Local 1581, A.F.T.* v. *Ysrael,* 492 F.2d 438 (9th Cir. 1974), *cert. denied* 419 U.S. 872 (1974). The alleged conflict which Hotchner seeks to develop between these two opinions is unsupportable. The two cases—although plainly distinguishable on their facts—are just as plainly consistent as to the legal standards which they apply.

In *Guam*, the Ninth Circuit reversed and remanded a directed verdict entered in favor of the defendant on the grounds that the evidence adduced at trial, when viewed in a light most favorable to the plaintiff, was sufficient to require that the issue of liability be submitted to a jury. The court opined that:

> [i]n this case, Ysrael's own testimony as an adverse witness is enough to get the plaintiff to the jury under the *New York Times* standards. He repeatedly admitted that he did not know whether what he said was true.

The fact that Ysrael, the *author* of the alleged libel, testified that he had no reason to suspect that his own statements were true was viewed by the Ninth Circuit as sufficient to support a legitimate inference of reckless disregard. In the *Hotchner* case, the Second Circuit determined that the evidence adduced at trial was *not* sufficient to support a legitimate inference of reckless disregard on the part of the publisher, Doubleday:

> Thus, there was no evidence from which the jury might reasonably have found that the defendant published the alleged libels with knowledge of falsity or reckless disregard for truth. (551 F.2d at 914)

As the court in *Guam, supra,* recognized "when no contrary inference can legitimately be drawn", 492 F.2d 438, 441, a court must render judgment in favor of a moving party or an appellant. That is exactly what the Second Circuit in *Hotchner* did. The decisions of the Ninth Circuit in *Guam* and of the Second Circuit in *Hotchner* are consistent, and cannot be construed by Hotchner to be otherwise.

Thus, the standard of review applied by the Second Circuit in this constitutional libel action was the same as

that enunciated by this Court in *New York Times Co.* v. *Sullivan, supra:*

> '[T]he rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect". [Citations omitted]. We must "make an independent examination of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion into the field of free expression.' 376 U.S. at 285. [Citation omitted].

This rule was restated by Justice Stevens (then Judge Stevens) in *Gertz* v. *Robert Welch, Inc.*, 471 F. 2d 801 at 807 (7th Cir. 1972):

> "[T]he [Supreme] Court has plainly stated that the evidence establishing reckless disregard for the truth must be clear and convincing, and that an appellate court has *an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved.* Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment." (Emphasis added)

Adhering to these directives, the Second Circuit in *Hotchner,* following the standard which it had only some six months before applied in *Buckley* v. *Littell,* 539 F. 2d 882 at 888 (2nd Cir. 1976), *cert. denied,* —— U.S. ——, 45 U.S.L.W. 3489 (U.S. Jan. 17, 1977), reviewed the trial record as follows:

> "To insure that proper weight has been given to the protection of First Amendment rights, it is important

> that the court make 'an independent examination of the whole record' in scrutinizing the jury finding of scienter in a libel case" (551 F.2d at 913; Pet., p. 6a)

We now turn to a discussion of the evidence introduced at trial which supports as a matter of law the Second Circuit's determination that Hotchner constitutionally failed to prove that Doubleday published with reckless disregard for the truth.

The Second Circuit held that the evidence was insufficient to establish that Doubleday "had cause seriously to suspect" that the statements about Hotchner were not true. (551 F. 2d at 914; Pet., p. 8a) In fact, there was *no evidence introduced at trial,* let alone clear and convincing evidence, that Doubleday had reason to suspect the truth of the statements about Hotchner or entertained serious doubts about the truth of the statements concerning Hotchner.

Hotchner called no witnesses who testified as to any doubts expressed by Doubleday. None of his witnesses even claimed that Doubleday should have known that any of the statements about Hotchner were false.

Doubleday, on the other hand, put on the stand Kathryn Medina, the editor who had overall responsibility for the Book; William Austin, the assistant contracts manager who reviewed eight pages (Exhibits 5A-5G, 203a-210a) containing most of the statements about Hotchner; Frank Hoffman, the copy editor who read the Book twice for inconsistencies and errors[3] after certain of the references to Hotchner had been eliminated, toned down or rewritten;

---

[3] Although the copy editor's job is not to verify facts independently, to the extent that any of the statements about Hotchner were inconsistent with each other or appeared unlikely in view of the other statements made in the book, Mr. Hoffman would have called them to the editor's attention (369a-371a).

and, by a mutually agreed-to written stipulation, Helen Lane, the independent translator (349a-350a) who prepared the English text for publication from the original Spanish work (196a). Mrs. Medina and Mr. Austin both testified that they had no reason to suspect that any of the statements about Hotchner might be false (360a, 375a). Hotchner's attorney did not raise this subject with either witness on cross-examination. Mrs. Lane, while she was translating, was reading "Carlos Baker's monumental definitive biography of Hemingway" (Exhibits S, U, and Y, 10a, 254a, 10a), the acknowledged authority on the facts of Hemingway's life, and she discovered "a number of misspellings and little errors of detail in Castillo-Puche" (Exhibit 16, 22a). None of the "little errors of detail" concerned Hotchner.[4] Both Mr. Hoffman and Mrs. Lane testified, again without challenge on cross-examination, that the name Hotchner never came up in their discussion with or reports to Mrs. Medina (187a, 371a).

Hotchner, as he has done throughout this litigation, contends that certain Doubleday documents constitute evidence of reckless disregard for the truth by Doubleday. (Pet. pp. 11-14). An examination of these documents reveals that they prove the exact opposite, namely, that Doubleday exercised the care of a reasonable publisher and attempted in good faith to avoid libeling Hotchner.

---

[4] In this regard, at footnote 8, page 13, Hotchner quotes from a letter which Mrs. Lane sent to Mrs. Medina. Through the use of ellipses and "emphasis supplied", he attempts to exploit this quote as evidence of reckless disregard and gives words a meaning which they were never intended to have. In fact, the "gross errors of fact", which Hotchner would have this Court believe refer to statements in the Book about him, refer to Castillo-Puche's comments and citations to Hemingway's novels. A reading of the entire letter (Exh. 17, 227a) and Mrs. Medina's testimony confirmed this. It has nothing whatsoever to do with whether Doubleday published the statements about Hotchner with reckless disregard.

The Austin memo (Exhibit 9, 214a) is a compilation by a non-lawyer of certain uncomplimentary statements about Hotchner. Mr. Austin's expression of concern that the statements could not be substantiated refers only to the fact that the statements are either expressions of the author's opinion or a statement of Ernest Hemingway whom Mr. Austin knew to be dead (375a, 379a, 380a). In any event, Mrs. Medina did eliminate and tone down these statements as recommended by Mr. Austin (Exhibits 5A-5G, 1 and 30 (Columns 2 and 3), 203a-210a, 230a). After she advised Castillo-Puche of this (Exhibit 11, 217a), he responded by letter (Exhibit 12, 219a) in which he (1) reaffirmed the truth of his comments about Hotchner, and (2) denied any intent to offend Hotchner:

> "I don't mind that you lighten the words with which I qualify Mr. Hotchner, specially (sic) taking away anything that could be used as a libel suit against me. Nevertheless, I don't want him to appear as a man who was in Ernest's most sincere trust and as a possessor of all his secrets, like he made it look in his books. He was always a servant to Hemingway, who didn't mind much about him. To me he said once that Mr. Hotchner was a man he wouldn't want to be left alone in a room with.
>
> Even so, I have no interest in offendering [sic] Mr. Hotchner. You could then, as you said, send me the pages in which this toning down has taken place and I hope to be able to give my approval immediately." (exhibit 12, 219a).

In fact, Doubleday had good reason to believe in the accuracy of Castillo-Puche's statements. Prior to publication, Doubleday knew that the author was well respected (316a) and that Destino, one of Spain's major publishers, had represented and warranted to Doubleday that the work

was not libelous nor did it invade anyone's privacy (Exhibit 2, 201a). This was especially comforting since the Spanish work was published seven years before Doubleday's Book. Prior to the time it acquired the right to translate, Doubleday was also aware of a favorable book review and had independently obtained two reports from qualified experts[5] which praised the Spanish work. (Exhibits S, Q and R, 246a-248a)

Moreover, Doubleday, prior to publication, had tangible evidence of the close relationship which existed between Castillo-Puche and Hemingway. This evidence included, *inter alia,* reproductions of photographs of *them* at a private swimming party (Exhibit E, 9a); at Hemingway's residence (Exhibit H, 10a); in Castillo-Puche's Madrid office (Exhibit M, 10a); and in other places together (Exhibit 26, 7a, Exhibits A, C, D, F, 9a), as well as a reproduction of correspondence from Hemingway to Castillo-Puche (Exhibit N, 10a). In addition, Doubleday had knowledge that they had travelled together to the bedside of the famous Spanish novelist, Don Pio Baroja (Exhibit G, 9a), and that Hemingway had chosen Castillo-Puche to administer the Hemingway Prize for Spanish literature (Exhibit N, 10a).

Parenthetically, we note that Hotchner's petition claims that the Second Circuit relied on evidence that was not known to Doubleday at the time of publication (Pet., pp. 7, 17 and 19). He points to the testimony of Sister de Mola (590t et seq.) and Jose Carrascal (600t et seq.) whom Doubleday had not spoken to until after publication of the Book. Of course, this argument completely misses the

---

[5] Ironically, one of these reports (Exhibit Q, 245a) specifically preferred the Book to Hotchner's *Papa Hemingway*, stating:

> "Castillo-Puche's reminiscences * * * have a sort of noble honesty clearly missing in Hotchner." (Exhibit Q, 246a)

point. These witnesses testified concerning the excellent reputation enjoyed by both the Spanish author and publisher prior to the publication of the Book (e.g., 591-592t). Doubleday had knowledge of these reputations prior to publication from various sources, including the *Saturday Review,* the two written reports from the independent Hemingway experts, and a bibliography furnished by Castillo-Puche; Mrs. Medina so testified. (345-50a; 361a; Exhibit X) These witnesses were called to confirm that the Spanish author and publisher enjoyed these excellent reputations prior to Doubleday's publication of the Book. The fact that Doubleday did not obtain this information originally from Sister de Mola or Mr. Carrascal is fundamentally irrelevant. Indeed, if Hotchner's contrived argument were accepted, evidence of reputation would rarely be admissible at trial.

The actions of the Doubleday staff to which we have already referred (*supra,* pp. 10-12) not only negate the claim of serious doubts, but affirmatively manifest careful regard for the propriety of the statements about Hotchner. Thus, Mrs. Medina, recognizing that some of the statements were not complimentary (Exhibit 6, 211a), asked the contracts department of Doubleday to approve them before publication (355a). The contracts department, to which any such problems are referred as a matter of Doubleday policy (372a, 374a), recommended that eleven separate statements should be toned down or eliminated (374a) and Mr. Austin wrote his memorandum to Mrs. Medina suggesting revisions. (Exhibit 9, 214a) Most significant are the eight pages reviewed by Mr. Austin (Exhibit 5A-G, 203a-210a) which, when compared with the substituted language of the Book (Exhibit 1, 6a), show that substantial changes were made by Mrs. Medina, about which Mrs. Medina testified in some detail (355a-359a). Five of the statements mentioned in the Austin memoran-

dum, including one entire quotation of Hemingway, were deleted; three were toned down; one, as found by the jury, was not defamatory and only two others—"two-faced behavior" and "exploiter of his reputation" were left in the Book. Rather than showing reckless disregard for the truth, these actions are clear evidence of a lively concern for Mr. Hotchner.

Mrs. Medina was unequivocal in her belief that toning down the statements about Hotchner had cured any potential injury to his reputation. (Exhibits 11, 13, 216a, 221a). In writing to Castillo-Puche to inform him of the toning down, she stated that the changes concerning Hotchner would eliminate "the risk [of] a libel suit [by Hotchner], or even a lot of unpleasantness in the American press". (Exhibit 11, 216a). Castillo-Puche's response (Exhibit 12) was a reaffirmation of the truth of all his statements about Hotchner and a denial of any intent to offend Hotchner.

The fact that Doubleday believed that it had eliminated all possible libel of Hotchner, and that Castillo-Puche had confirmed the truth of his statements about Hotchner, is significant. The inquiry with respect to the *New York Times* standard "refers to the defendant's attitude towards the truth or falsity of the material published" (*Carson* v. *Allied News Co.*, 529 F. 2d 206 a 214 (7th Cir. 1976); Pet., p. 13). The test is one which equates "reckless disregard of the truth with subjective awareness of probable falsity" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 334-5, n.6 (1974)).[6]

---

[6] Since *Gertz* v. *Robert Welch, Inc.*, *supra*, at 348, requires that the defamatory statement must make "substantial danger to reputation apparent", the toning down did not make danger to reputation apparent to Doubleday. The statements are not actionable for this reason alone.

With respect to subjective awareness of probable falsity, Hotchner's reliance (Pet., p. 13) on the Second Circuit's opinion in *Buckley* v. *Littell*, 539 F. 2d 882 at 896 (2nd Cir. 1976) attempts to distort the import and effect of a publisher's concern for a particular statement. In *Buckley*, the Second Circuit states that the publisher's concern should have been a "red flag" to Littell. It should, of course, have been a red flag to Littell because Littell was *the author* and not the publisher. He, unlike the publisher, should have known whether his statement was true or not. In this case *the publisher* (Doubleday) itself insisted upon eleven significant changes in the manuscript, and obtained a confirmation of truth *from the author* with respect to all of the statements about Hotchner. Cf. *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 178 N.Y.L.J. No. 16, p. 1 *et seq.* (July 25, 1977) (N.Y. Ct. Appeals: 1977).

Hotchner's petition goes on at length (Pet., pp. 22-23) arguing that the statements about Hotchner were not "hot news". Doubleday has never contended that the statements were hot news, nor is the point relevant. Any meaningful inquiry must concentrate on Doubleday's attitude toward the truth or falsity of the statements. If there was no reason to suspect the truth, the inquiry ends. Doubleday never entertained any serious doubts about the Book's veracity. In this regard, however, Hotchner contends (Pet., p. 23) that Doubleday's investigatory failure is proven since no Doubleday employee read *Papa Hemingway* and because Doubleday did not check with the witnesses called by him at trial. As an initial matter, it would be prohibitive and "chilling" to require a publisher to read the substantively related works of every minor character (like Hotchner) whose name incidently appeared in one of its books. In addition, as was previously mentioned, Doubleday independently obtained two reports from qualified Hemingway

experts prior to obtaining rights to the Book. One report specifically preferred the Book's "noble honesty" to Hotchner's *Papa Hemingway* so it is obvious that prior to publication an expert retained by Doubleday was familiar with Hotchner's book. (Exhibit Q, 246a). Moreover, both Mrs. Medina (in editing) and Mrs. Lane (in translating) consulted Carlos Baker's definitive Hemingway biography.[7] (Exhibit 8, 213a, Exhibit 16, 226a)

As far as witnesses are concerned, in opposition to Doubleday's summary judgment motion, Hotchner contended that Doubleday should have confirmed the Spanish author's account not with the people Hotchner called as witnesses, but "with Hemingway's widow." (115a). Yet Mrs. Hemingway, called by Doubleday at trial, testified that when she read the Book she did not consider the statements about Hotchner to be unfair or inaccurate (388a-390a). Asked to direct her attention to each of the Book's references to Hotchner, she further testified that she "considered them true enough and accurate" (389a).

The documentary evidence on which Hotchner relies simply does not constitute evidence that Doubleday "entertained serious doubts" as to the truth or falsity of the statements about Hotchner. The Second Circuit recognized this. In fact, in light of Doubleday's removal, or toning down, of the eleven passages about Hotchner and its receipt of the Spanish author's confirmation of the truth of the original statements, quite the opposite was proved.

Hotchner's second line of proof of reckless disregard sought to show that Doubleday should have known that the Spanish author had feelings of *ill will* towards Hotchner. In fact, in an attempt to disguise the utter repetitive-

[7] In this regard, five out of the twelve references to Hotchner contained in Carlos Baker's index relate to Hotchner's exploitation of Hemingway (67a, 69a, 70a, 73a and 74a).

ness of this argument, Hotchner's petition utilizes constantly changing synonyms in an attempt to make this point (e.g., animus, hatred, etc.).

There is no legal precedent for allowing a finding of reckless disregard of the truth against a publisher solely on evidence of its knowledge of an author's ill will. Cases have held that a jury may consider an author's motive and ill will in finding reckless disregard, *but always as to the person who had such motive or ill will.* Proof of ill will alone as to anyone, much less to attribute it in this case to the publisher, is insufficient to support a finding of reckless disregard. As Judge Stevens stated for the Seventh Circuit in *Gertz:*

> "One distinction which is lost in some of plaintiff's arguments should be kept in mind. . . . '[I]ll will toward plaintiff or bad motives, are not elements of the New York Times standard'. Rosenbloom v. Metromedia, 403 U.S. 29, 52 n. 18, 91 S.Ct. 1811, 1824, 29 L.Ed. 2d 296 (opinion of Mr. Justice Brennan). Thus, the kind of malice which will, for example, defeat a conditional privilege in the traditional tort law of libel, will not satisfy the New York Times standard. However bad its motives, a publisher is protected by the First Amendment as long as the allegedly libelous statements were not made with knowledge of falsity or with reckless disregard of whether they were true or false." (471 F. 2d at 807 n. 13).

As we have already demonstrated, the standard of reckless disregard turns on the defendant's attitude toward the truth or falsity of the statements, and not on the defendant's animosity toward the person defamed. (See e.g., *Gertz* v. *Robert Welch, Inc., supra; St. Amant* v. *Thompson,* 390 U.S. 727 (1968); *Carson* v. *Allied News Co., supra,* at

209, 214). Of course, Hotchner's ill will argument is one further step removed from this standard. According to Hotchner, it is not Doubleday's ill will that is at issue (even the trial judge recognized that Doubleday endeavored to avoid injuring Hotchner (406a)), but Doubleday's alleged knowledge of Castillo-Puche's ill will. Hotchner has not and cannot introduce one iota of authority—from any year or jurisdiction—which suggests that a publisher's awareness of an author's low regard for his subject is evidence, let alone a sufficient basis, to support a finding of the publisher's reckless disregard for the truth.

In this regard, Hotchner has argued that his case should be measured against the ill will present in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) and *Goldwater* v. *Ginzburg,* 414 F. 2d 324 (2nd Cir. 1967). (Pet., pp. 22-23). In *Butts,* as this Court noted, plaintiff Wally Butts was ruined. *Goldwater* involved a notorious and long standing feud characterized by personal animosity and an attempt to ruin a career. In both cases the publishers participated actively in the attack. Conversely, Doubleday tried to protect Hotchner, only an incidental character, by toning down statements about him. Of course, the "violence and vituperativeness" of the libel published in *Goldwater* and the impact of the libel upon the plaintiff in *Butts* are plainly different than the "toned down" statements found by the jury to libel Hotchner, and to result in actual damages to him of one dollar.

Even if it could be said that Doubleday did have knowledge of the author's alleged ill will toward Hotchner, armed with this knowledge, Doubleday acted cautiously in writing to Castillo-Puche who responded and confirmed the truth of the original statements, but agreed to a toning down because, in his words, he had "no interest in offendering [sic] Mr. Hotchner" (Exhibit 12, 219a). Doubleday then toned

down the statements about Hotchner, sent the revised manuscript pages to the author for his review and approval and, prior to publication, had the revised manuscript read twice by the copy editor.

The only evidence other than the statements about Hotchner which was introduced with respect to Doubleday's alleged knowledge of ill will was the prejudicial Purczinski translation. The Purczinski translation was offered to prove that the words in the original Spanish Work as read by Doubleday's agent Lane put Doubleday on notice of the hatred of Castillo-Puche towards Hotchner (Pet., pp. 14-15). In spite of this fact, we *know* how Mrs. Lane translated the statements which the jury found to be libelous, since these statements are all contained on the manuscript pages which Mrs. Medina submitted to Doubleday's Contract's Department for review.[8] (Exhibits 5a-5g, 203a-210a) Furthermore, it defies logic to assume that which is essential to Hotchner's contention, that Mrs. Lane would translate the Spanish in exactly or approximately the same manner as Purczinski. For example, from the Spanish "vagabundo" Purczinski translated, not Mrs. Lane's "ringmaster", but an assertion that Hotchner looked "like one of the leaders of the New York or Chicago gangs"[9] (Ex-

---

[8] Moreover, even if Mrs. Lane had initially translated the Book in a manner similar to Purczinski, it would have been outside the scope of her duties, as translator into literary English, to report more offensive language to Doubleday.(196-192a; 349a-350a) Thus, Hotchner's reliance on *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920) (Pet., pp. 15, 25) is misplaced. Indeed, that case supports Doubleday since in *Corrigan* the agent (Mrs. Lane was an independent contractor) was intimately involved with the writing and preparation of the published material. In fact, the book was dedicated to the agent as "the Second Father of this Book." (Id. at 71)

[9] Interestingly, Carlos Baker in his definitive work on Hemingway, says that Hemingway joked with Hotchner "about his freckled face and gangster slouch" (68a).

hibit 30, 233a). The obvious question raised by Purczinski's translation is why he did not select Detroit, or Madrid, or Paris, or even Poughkeepsie? The answer may be found in the fact that the Professor was not qualified to translate, or to testify as an expert. At trial it was established that, unlike Mrs. Lane, Purczinski had never translated a book from Spanish to English, been employed as a literary translator by a publisher, or lived in Spain. He had only infrequently visited it, and he had no personal knowledge of the colloquial terms used by Castillo-Puche (which Purczinski had translated with the help of unnamed third persons and dictionaries). He admitted that, even among qualified experts, there is room for disagreement as to the English equivalent of colloquial Spanish, and he testified that he translates accurately until he comes to uncomplimentary passages about living persons, which he declines to translate. (262-268a)

Hotchner's argument—that Mrs. Lane did, or should have, translated the portions of the Book describing Hotchner as Purczinski did, and should therefore have made comments to Doubleday about those passages—is further blunted by the fact that prior to translation two qualified experts commissioned by Doubleday to review the Spanish edition likewise found no cause for comment. Thus, other than the fact that the Lane translation was uncomplimentary, there is no evidence in the record of Doubleday's alleged knowledge of Castillo-Puche's ill will toward Hotchner.

Hotchner's contention notwithstanding (Pet., pp. 23-29), the Second Circuit did not reverse the jury verdict on the grounds that the statements about Hotchner were automatically protected as "opinion". Clearly it reversed on the grounds that the evidence was insufficient as a matter of law to support a conclusion that Doubleday published

any statements about Hotchner with reckless disregard for the truth. Thus, the Second Circuit held that the statements of opinion about Hotchner were not actionable against Doubleday since Doubleday had no "knowledge of the falsity or probable falsity of the underlying facts" upon which these statements were based. (551 F.2d at 913; Pet., p. 7a)

We have previously examined in general terms the failure of Hotchner's proof and the reasons why Doubleday had no cause to seriously doubt the truth of the statements about Hotchner. We will now consider individually each of the six statements (passage references are to the Special Verdict (151a)) which the jury found to be libelous or invasive of Hotchner's privacy:

> Passage 2. "It was Ordonez, as I remember, who first called him 'Freckles', and the nickname stuck. He pretended not to mind and was good-natured about everything, but he was such a toady at times that it was sickening." (Emphasis added) (152a)

The substantial truth of the greater part of this passage —that Hotchner's nickname was "freckles" and that it was Ordonez who first called him that—was agreed to by all witnesses including Hotchner. Hemingway mentioned it himself in "The Dangerous Summer", a series of articles published in Life Magazine (Exhibit 29c, p. 78). The remainder of the sentence is clearly Castillo-Puche's opinion. Mary Hemingway testified on cross examination that she considered Hotchner a toady (532t) and Valerie Hemingway said that many people deferred to, therefore were "toadies" to, Ernest Hemingway (418t). The remainder of his comments in the Book bear out that the statements were Castillo-Puche's honest reaction to, and opinion of, Hotchner. Moreover, Castillo-Puche described Hotchner's

manner toward Hemingway and concluded that it was obsequious (Exhibit 1, page 82). He also stated that Hotchner was "very careful to be properly attentive to Mary and extremely polite to her and the other guests, but he kept his eye on Ernesto every minute, watching his every move and listening to his every word, especially when he was approached by journalists or photographers" (Exhibit 1, page 196). Surely these facts which Hotchner never denied and which the jury did not find libelous permitted the author to conclude that Hotchner was a toady.

> Passage 4. "The thing I disliked most about Hotchner was his two-faced behavior toward people who were Ernesto's real friends, people such as Juanito Quintana and even Ordonez. Though he was very clever at hiding his true feelings, you could tell that Hotchner was really a hypocrite. But he put up a very good front as Ernesto's mild-mannered, obedient servant." (Emphasis added) (154a).

At trial Hotchner admitted that he was annoyed at Quintana for failing to secure bullfight tickets and lodging for the Hemingway entourage. According to Hotchner, Quintana squandered the money Hemingway gave him for the tickets and lodging (166t). Castillo-Puche undeniably had the opportunity to observe the way Hotchner acted toward Hemingway's Spanish friends when Hotchner was in Hemingway's presence, and when he was not. By observing Hotchner's actions and mannerisms toward Hemingway's Spanish friends, he formed the opinion that Hotchner was "two-faced" or was a "hypocrite". No evidence was introduced at trial to the effect that Castillo-Puche did not observe these relationships or that he did not believe in his honest opinion that Hotchner was a hypocrite. That he had the opportunity to make these observations is substantiated by the testimony of Mary (384a-

385a) and Valerie (382a-383a) Hemingway and Annie Davis (288t-289t, 291t-292t, 328a-329a).

Passage 6. "Hotchner did his best all summer long to make the imaginary duel between Ordonez and Dominguin a real one; in moments when Ernesto was tense or had no one around for company, he was half convinced he was witnessing a genuine 'civil war' in the bullfight world, though I for my part thought the whole affair was a big laugh, and almost everyone else did too.

As an expert at grinding out publicity in the United States, Hotchner knew what a big splash Ernesto's articles were going to make, and was already bragging about what a coup they would be.

I felt very bad about those Life articles, called The Dangerous Summer, to tell the truth, because it seemed to me that the whole farce was beneath Ernesto and that he should have refused to have anything to do with it.

'Freckles' was never open and aboveboard. His mild manner and his air of shy deference seemed to me quite a cover-up for his exploitation of Ernesto." (156a)

Passage 14. " 'Freckles' was in complete control of the situation, and I wasn't at all surprised that he had earned lots of money for Ernesto by signing him up with the television networks and mass-circulation American magazines, though I was quite certain Hotchner had been motivated by something other than worshipful admiration for a great writer." (164a)

Passage 16. "Only a woman like Mary could have put up with those two ridiculous figures who hung around Ernesto every minute: Davis the jealous watchdog of his fame and fortune and Hotchner the exploiter of his reputation. Only Mary knew that Er-

nesto's real riches were intangible, and therefore she allowed him and Davis and Hotchner to do as they pleased. *It is possible that his two American friends may have sincerely thought they were looking after his interests and protecting him.*" [10] (166a)

The facts upon which each of these passages is based were admitted in the Stipulation of Uncontroverted Facts (191a) and in the testimony of Alfred Rice (475t-487t), Hotchner's former attorney and agent who served in the same capacity for Hemingway. The Life Magazine articles entitled "The Dangerous Summer" (Exhibits 29a, 29b, 29c, 8a) confirm the duel between Ordonez and Dominguin and the publicity that it generated. By 1959, Hotchner had admittedly earned huge sums from adapting Hemingway works. In addition to the knowledge and personal observations of Castillo-Puche in 1959, by the time Castillo-Puche wrote his book in 1967 Hotchner had earned close to a million dollars in projects involving the name of Ernest Hemingway. When it is admitted that Hotchner earned almost a million dollars writing about or adapting Hemingway works, the statements calling Hotchner an "exploiter" of Hemingway's reputation (passages 6 and 16) or indicating that "Hotchner had been motivated by something other than worshipful admiration for a great writer" [11] (passage 14), are, at the very least, not unreasonable expressions of opinion.

In short, the record demonstrates that the statements were opinions based upon admitted or substantiated facts

---

[10] The last sentence in this passage (emphasized), irrespective of all other considerations, should have precluded a finding that the passage defames Hotchner.

[11] The finding by the jury that this passage is libelous is clearly inconsistent with its earlier finding that Passage 11 (161a)—"he's [Hotchner] out for number one"—is not.

and the personal observations of Castillo-Puche. As a matter of law, therefore, they could not have been published by Doubleday with knowledge of falsity or reckless disregard for the truth, and thus are not actionable.

The sixth passage (Passage 7 from The Special Verdict), is a quotation of a conversation between Hemingway and Castillo-Puche:

> 7. "Then he dropped the subject of Davis and started in on Hotchner: 'He's a little precious, but he's a very smart cookie.'
>
> 'I can see that he's very fond of you,' I replied.
>
> Then, a little while later, he'd whispered, *'I don't really trust him, though'.*" (Emphasis added) (157a).

The last emphasized sentence is a remark attributed to Hemingway about Hotchner. It was established that neither Hotchner nor any one of his trial witnesses was ever a party to or heard any conversation between Hemingway and Castillo-Puche, and Hotchner himself admitted that he did not speak or understand Spanish. Doubleday, on the other hand, called witnesses who spoke and understood Spanish and who testified that Hemingway and Castillo-Puche were friends and conversed in Spanish. And it was their testimony that it was more likely than not that Hemingway would have made this statement about Hotchner.[12]

---

[12] Hotchner's petition (p. 19) argues the Second Circuit was in error in holding that the language used in this passage was characteristic of Hemingway (p. 19). He cites his own testimony that Hemingway's language was always "one of politeness" and the testimony of his widow, that she never heard him be coarse or crude. Yet in *Papa Hemingway*, Hemingway is quoted by *Hotchner* as saying "shove them up his ass" (p. 240), "Black-Ass" (p. 118), "goddamn" (pp. 108, 115, 275, 294), "bastards" (p. 119) and "son-of-a-bitch" (pp. 108, 115, 275, 294). In one sequence when asked to suggest a new title for a film, Hotchner quotes Hemingas saying:

However, irrespective of the likelihood of Hemingway having made the statement or one similar to it, the record of its publication precludes a finding that it was published with reckless disregard for the truth. Initially this statement appeared in the manuscript (the Lane translation) in a much more derogatory form as follows:

> "Yes, that's true, but he's [Hotchner] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." (Exhibits 5d and 30, 206a, 231a).

When Mrs. Medina revised this, she eliminated the dubious sexual characterization so that the sentence read "I don't really trust him, though". Moreover, when she sent the revisions to Castillo-Puche, he wrote back, long before he knew this statement would be the basis of a libel action, and reconfirmed that:

> "Ernest did not always talk highly of him [Hotchner]. To me he said once that Mr. Hotchner was a man that he wouldn't want to be left alone in a room with." (Emphasis added) (219a, Exhibit 1).

In short, before this statement was published, Doubleday substantiated the specific remark with the only person who heard it. He confirmed both the idea expressed and the more offensive language used by Hemingway. Yet, Doubleday did not return to the more derogatory version, but published the idea in the least offensive manner. There-

---

"Well then, here it is: F as in Fox, U as in Universal, C as in Culver City and K as in R.K.O." (p. 109).

At trial, Hemingway's daughter-in-law Valerie testified that rather than use words like "make-out", Hemingway would have used a word beginning with "f" (466-467t). A third source, Carlos Baker, quotes Ernest say saying "how shitty" (65a) and "shit-maru" (69a).

fore, as a matter of law, the record with respect to the publication of Passage 7 precludes a finding that it was published by Doubleday with reckless disregard.

Finally, Hotchner's petition (pp. 24-25) argues that the statements about Hotchner do not concern matters of public interest. However, it has been held that Hotchner is a public figure at least with respect to his relationship with Hemingway, a ruling which he himself has never objected to. Further, inasmuch as Hotchner claims to be Hemingway's Boswell, his relationship to Hemingway is clearly a matter of public interest and concern.

In determining the existence of "reckless disregard", this Court has held that failure to check the accuracy of the information published with material that happens to be in the defendant's possession (*New York Times Co.* v. *Sullivan,* supra); lack of ordinary care in making charges against a plaintiff (*Garrison* v. *Louisiana,* 379 U.S. 64 (1964); mere negligence (*New York Times Co.* v. *Sullivan*); and failure to substantiate information supplied by an unverified informer (*Monitor Patriot Co.* v. *Roy,* 401 U.S. 265 (1971)) are not sufficient to sustain a plaintiff's verdict. Based on the foregoing authority, there was no basis for a finding in this case that Doubleday published statements about Hotchner with reckless disregard for the truth. There was no evidence that Doubleday had any doubts, let alone serious ones, concerning the truth of the statements about Hotchner. Moreover, there was no contradictory evidence in Doubleday's files, nor was any known to its employees. Doubleday followed its normal and established procedure in publishing the Book, relying on the reputable opinions, reviews and warranties discussed in detail, *supra,* pp. 12-13. If the evidence that was presented in this case is deemed to be sufficient to prove reckless disregard, an impermissibly loose definition of reckless disregard would be established which would under-

mine the tough constitutional standards mandated by this Court in its recent decisions.

In conclusion, the Second Circuit broke no new ground in this action; it merely followed the mandate of this Court in reviewing the constitutional sufficiency of the evidence in this public figure libel action. At the very least the evidence in this action indicated that the statements which the jury found to be libelous were not made by Doubleday with a high degree of awareness of probable falsity or serious doubts or under any other circumstances which permit a plaintiff to recover according to the "actual malice" standards espoused by this Court. Therefore, as a matter of law, the statements about Hotchner were not made with actual malice and the Second Circuit was correct in reversing the judgment below and mandating a judgment in favor of Doubleday dismissing Hotchner's complaint.

POINT II

Various other reasons not reached by the Second Circuit also mandated that the jury verdict be vacated.

Since the Second Circuit determined that the evidence was constitutionally insufficient to support a finding of publication with "actual malice", it was not necessary for the court to consider the numerous other reasons, which were fully briefed, that also compelled that the jury verdict in this action be vacated. These will not be discussed herein at length.

Briefly, (1) prejudicial error was committed throughout the course of the trial; (2) the invasion of privacy claim should have been dismissed as a matter of law since it was legally insufficient pursuant to New York Civil Rights Section 51; (3) it was conceded that there was no proof that Doubleday published with knowledge of falsity and

there was no proof that Doubleday was motivated by ill will or any other consciously motivated reprehensible conduct[13] and therefore the proof was insufficient to permit an award of punitive damages either under constitutional standards or under substantive New York law and (4) in any event, the amount of punitive damages, $125,000.00, was outrageously excessive.

Doubleday respectfully requests the right to brief these matters should this Court grant Hotchner certiorari.

CONCLUSION

By reason of the foregoing Hotchner's petition for a writ of certiorari should be denied.

New York, New York
July 26, 1977

Respectfully submitted,

JAMES F. DWYER
ROBERT M. CALLAGY
JAMES F. RITTINGER
Attorneys for Respondent
Doubleday & Company, Inc.

SATTERLEE & STEPHENS
Of Counsel

---

[13] With respect to the total lack of evidence of common law malice, Hotchner has continuously attempted to distort Mrs. Medina's words: "to get at Hotchner" (Exhibit 11, 217a; Pet., p. 16). Even the trial court recognized that these words had a meaning exactly opposite to that which Hotchner has attributed to them. Thus, with respect to Hotchner's contention that these words evidenced a heedless disregard for the rights of Hotchner, the trial court stated: "quite the contrary" was true as Doubleday "was anxious not to . . . get at Hotchner" (406a). It was this recognition by the trial judge of absolutely no evidence of common law malice on the part of Doubleday which made the submission of the punitive damage issue to the jury so inconsistent and contradictory.